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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 499

FRANK TENNYSON NEELY,

Petitioner,

vs.

MERCHANTS TRUST COMPANY OF RED BANK, NEW JERSEY, AS ADMINISTRATOR OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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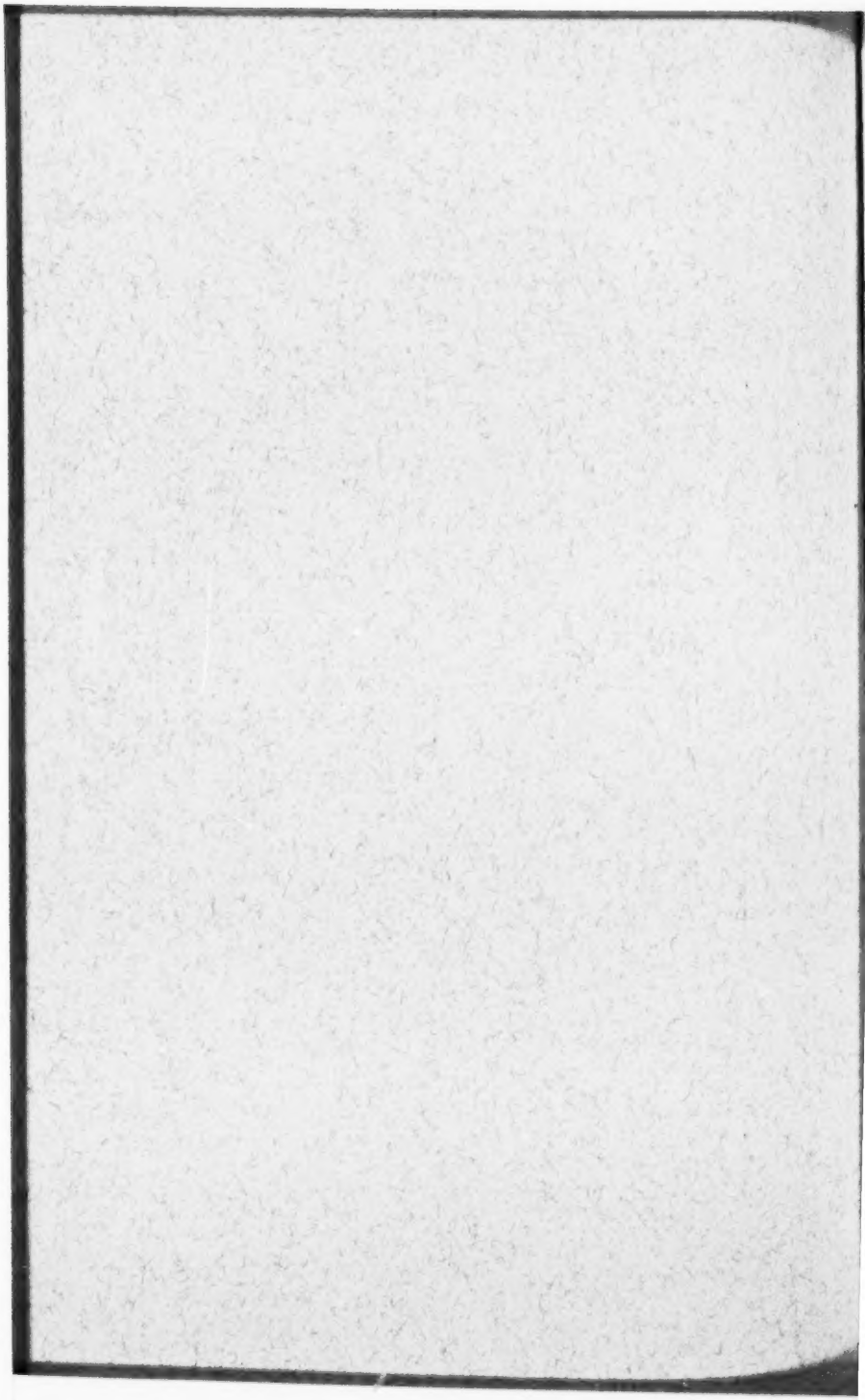

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement	3
Specification of errors to be urged	10
Reasons for granting the writ	11
Conclusion	18

Table of Cases Cited.

Aetna Ins. Co. v. *United Fruit Co.*, 304 U. S. 430	3
Alexander v. *Lewes*, 104 Wash. 32	13
Allison's Est., In re, 106 N. J. Eq. 55	14
Bentley v. *Lamb*, 112 Pa. 480	13
Berg v. *Moreau*, 199 Mo. 416	13
Berryman v. *Graham*, 21 N. J. Eq. 370	14
Bolmon, et al. v. *Overall*, 80 Ala. 451	11
Boone v. *Ridgway's Exrs.*, 29 N. J. Eq. 543	14
Brinker v. *Brinker*, 7 Pa. 53	11
Brinton v. *Van Cott*, 8 Utah 480	13
Brooks v. *Yarbrough*, 37 F. (2d) 527	12, 15
Brown v. *Sutton*, 129 U. S. 238	15
Burdine v. *Burdine's Exr.*, 98 Va. 515	13
Burmeister v. *Hamman*, 208 Iowa 412	11, 13
Burns v. *Smith*, 21 Mont. 251	13
Calef's Will, 109 N. J. Eq. 181, 11 N. J. Eq. 355	2, 12
Clark's Appeal, 57 Conn. 565	13
Cooper v. *Colson*, 66 N. J. Eq. 328	15
Corcoran v. *Kennedy*, 177 N. Y. App. Div. 63	13
Danenhauer v. *Danenhauer*, 105 N. J. Eq. 449	15
Davis v. *Wakelee*, 156 U. S. 680	14
Davison v. *Davison*, 13 N. J. Eq. 246	15
Dodd v. *Union Indemnity Co.*, 32 F. (2d) 512	13
Emery v. *Darling*, 50 Ohio 160	11
Erie R. Co. v. *Tompkins*, 304 U. S. 64	12

	Page
Flanagan v. *Flanagan*, 209 N. Y. App. Div. 190	18
Griffin v. *Whittemore*, 109 N. J. Eq. 204	16
Helvering v. *Mitchell*, 303 U. S. 391	18
Hiatt v. *Williams*, 72 Mo. 214	11
Jefferson v. *Simpson*, 83 W. Va. 274	13
Johnson v. *Hubbell*, 10 N. J. Eq. 332	12, 15
Johnson v. *McCue*, 34 Pa. 180	11
Journal Plaza Holding Co. v. *G. H. L. Co., Inc.*, 107 N. J. Eq. 14	16
Kastell v. *Hillman*, 53 N. J. Eq. 49	11, 16
Kelley v. *Devin*, 65 Ore. 211	13
Laune v. *Chandless*, 99 N. J. Eq. 186	11, 16
Lawrence v. *Prosser*, 88 N. J. Eq. 43	15
Lings v. *Urquhart*, 106 N. J. Eq. 506	15
Loffus v. *Maw*, 66 Eng. Repr. 544, 3 Giff. 592	4
Lovett v. *Lovett*, 86 Ind. App. 42	13
McLeon v. *Van Slyck*, 223 N. Y. 392	18
Maddox v. *Rowe*, 23 Ga. 431	11
Mauck v. *United States*, 94 F. (2d) 745	12
Merchants Ins. Co. v. *Lilgeomont*, 84 F. (2d) 685	13
Messinger v. *Paterson Savings Inst.*, 91 N. J. L. 654	14
Miller v. *Steele*, 153 Fed. 714	18
Moore's Admr. v. *Wagner's Admr.*, 243 Ky. 351	13
Monfort's Admr. v. *Rowland*, 38 N. J. Eq. 181	14
Naylor v. *Shelton*, 102 Ark. 30	11
Neely v. *Stacy*, 288 U. S. 606	2, 6, 12
Neubeck v. *Neubeck*, 94 N. J. Eq. 167	16
Neuman v. *Fantl*, 119 N. J. Eq. 351	14
Ochs v. *Ochs*, 122 N. J. Eq. 143	15
Ohlendiek v. *Schuler*, 299 Fed. 182	15
Oles v. *Wilson*, 57 Colo. 246	13
Page v. *Arkansas Natural Gas Corp.*, 53 F. (2d) 27	13, 14
Pflugar v. *Pultz*, 43 N. J. Eq. 440	15
Philadelphia, etc., R. R. Co. v. *Howard*, 13 How. 307	14
Railway Co. v. *McCarthy*, 96 U. S. 258	14
Riley v. *Allen*, 54 N. J. Eq. 495	15
Robinette v. *Olsen*, 114 Neb. 728	11
Ruhlin v. *N. Y. Life Ins. Co.*, 304 U. S. 202	3
Sanderson v. *Howell*, 121 N. J. Eq. 56	14

Page

Schutt v. *Missionary Soc. of the Methodist Episcopal Church*, 41 N. J. Eq. 115 ..... 12, 15
Skinner v. *Rasche*, 165 Ky. 108 11
Shatwell v. *Stickle*, 83 N. J. Eq. 188 16
Simmons, Ex Parte, 247 U. S. 231 16
Smith v. *Cameron*, 92 Kan. 652 13
Spencer v. *Spencer*, 25 R. I. 239 13
Throckmorton v. *Holt*, 180 U. S. 552 6
Torgerson v. *Hauge*, 34 N. D. 646 11
Townsend v. *Vanderwerker*, 160 U. S. 171 15
Turner v. *Kirkwood*, 62 F. (2d) 256 14
Van Duyne v. *Vreeland*, 12 N. J. Eq. 142 ..... 15, 16
Vreeland v. *Vreeland*, 53 N. J. Eq. 387 15
Vulcan Detinning Co. v. *American Can Co.*, 72 N. J. Eq. 387 16
Whitney v. *Hay*, 181 U. S. 77 15
Winfield v. *Bowen*, 65 N. J. Eq. 636 15
Woods v. *Dunn*, 81 Ore. 457 11
United States v. *Stevens*, 302 U. S. 623 12
Young v. *Young*, 45 N. J. Eq. 27 15
Zadig v. *Aetna Ins. Co.*, 42 F. (2d) 142 13

OTHER AUTHORITIES CITED.

Constitution of the United States, Fifth Amendment 11
Equity Rule 24 6
Federal Rules of Civil Procedure 52(b) 7
59 7
Judicial Code, Section 240(a), as amended by the Act of February 13, 1925, 28 U. S. C. A., Section 347(a) 2
Pomeroy: Specific Performance (3rd ed.), p. 357 18
Rules of the Supreme Court of the United States, Rule 38 (5b) 2
1 Schouler: Wills (6th ed.), Sec. 698 18

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FRANK TENNYSON NEELY,

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MERCHANTS TRUST COMPANY OF RED BANK, NEW JERSEY, AS ADMINISTRATOR OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, AND FREDERICK H. TARR, AS ANCILLARY ADMINISTRATOR IN THE STATE OF MASSACHUSETTS OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, AND MARY L. HODGKINS, HARRIET G. STACY, JAMES D. STACY, FANNY K. STACY, MARY S. STACY, ANNA S. LUFKIN, GILBERT C. McCORMICK, HARRY McCORMICK, LOLA ROBINSON, HETTIE M. MORSE, JENNIE M. SAYWARD, CLIFFORD E. STACY, FRED C. STACY, EVERETT STACY, WILLIAM A. HAMILTON, DORIS ALVORD, ALBERT J. McCORMICK.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Frank Tennyson Neely, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in

the above entitled case on June 29, 1940, which became final upon the denial of his petition for rehearing on September 11, 1940.

Opinions Below.

The opinion of the District Court, denying the motion to dismiss the bill of complaint, is reported in 16 F. Supp. 839 (R. 24-27), and its opinion dismissing the bill after trial is reported in 26 F. Supp. 130 (R. 1588-93). The opinion of the Circuit Court of Appeals denying the motion to dismiss the appeal is reported in 110 F. (2d) 525 (R. 1725); its opinion affirming the District Court is reported in 113 F. (2d) 953 (R. 1729), and its opinion denying the petition for reargument is unreported (R. 1737).[1]

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered June 29, 1940 (R. 1733). A petition for rehearing was duly filed on July 13, 1940 (R. 1734). It was denied on September 11, 1940 (R. 1737). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. Section 347 (a), and Rule 38 (5b) of the Rules of this Court.

Questions Presented.

1. Whether petitioner is entitled to specific performance of a contract to devise and the impressment of a trust where the contract was not in issue, was judicially admitted in prior litigation between the parties, was established by parol and documentary proof, and petitioner had irretrievably changed his position by eight years' performance thereunder to the promisor's great benefit and satisfaction.

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[1] The opinions in the prior proceedings between the parties *infra* are reported *sub nom. In re Calef's Will,* 109 N. J. Eq. 181; 111 N. J. Eq. 355; certiorari denied, *sub. nom. Neely* v. *Stacy et al.,* 288 U. S. 606 (1933).

2. Whether the decision below, denying such relief, conflicts with prior decisions of this Court, of the Second, Fourth, Fifth, Sixth, Eighth and Tenth Circuit Courts of Appeals and of the State courts of New Jersey.[2]

3. Whether the decision below denied petitioner due process of law by holding that he was bound to establish his case by anything more than a fair preponderance of the evidence and that he had failed as a matter of law to sustain such additional burden.

Statement.

In September 1921, after he had assisted her for a considerable period, the decedent, Eliza A. S. Calef, "employed" petitioner to extricate her from her grave financial difficulties and to provide and care for her during the rest of her life (R. 693-5, 1256-7, 1169-74, 1260, 898-9, 121, 315, 1160-1, 131-2, 1303-4). She was a widow, wholly estranged from her next of kin (the respondent cousins herein). She was faced with the loss of her home and litigation from creditors.[3] Petitioner was a man of standing, means and established skill in financial and business matters (R. 374-80, 1468-79, 176-8, 860-2, 116, 38-40). He assented to a mutual agreement whereby, in return for his assistance, care and services, he would receive decedent's residuary estate (if any) on her death, after trifling specific bequests

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[2] *Cf. Aetna Ins. Co.* v. *United Fruit Co.*, 304 U. S. 430, 434 (1938); *Ruhlin et al.* v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 206 (1938).

[3] Decedent then owed her brokers $22,030.16 (which petitioner subsequently worked out for her after guaranteeing the account) and they were threatening suit (R. 738-40, 345-7, 402-3, 840-4); her home required immediate bulkhead construction costing over $6,000.00 (R. 317-20, 336-7); she had dissipated all her securities, had no income or means of support, and her living expenses were $6,000.00 annually (R. 967-8, 856-7, 969, 810); she was reduced to selling her furnishings and even talked of suicide (R. 46, 113-14, 121, 131-2, 232, 1220-2, 695-6).

to servants and intimate friends[4] (R. 11, 12, 1721-4, 25-6, 68). The agreement was confirmed by decedent to petitioner in her own hand on his birthday, September 10, 1921 (R. 1179-81, 124, 1309, 855-6, 1382, 1770), and on September 16, 1921, by her to a retired New Jersey attorney (R. 428, 1771-78). A few days thereafter, decedent consulted an attorney in New York City, stating she wished to make her will in conformity with her agreement (R. 67-68, 1184). She thereupon sent this attorney a memorandum, in her own hand, of the will. In it, as agreed, she devised her residuary estate to

> "my friend F. Tennyson Neely, of the City, County and State of New York, *in return for his services rendered to me at a time when I most needed them*" (R. 202, 1721-4).

On September 29, 1921, decedent accompanied petitioner to the attorney's office, where the will was prepared in their presence from her memorandum. It was then read aloud and approved (R. 70-1, 204). Decedent thereupon duly executed the will before witnesses and delivered the original to petitioner as the promisee therein named, saying "This concerns you, keep it"[5] (R. 71-3, 203-6, 1184-7, 1291).

Decedent thereafter affirmed this contract with petitioner in repeated spontaneous declarations to her closest friends, advisors and confidantes over the remaining eight years of her life, during which time petitioner remained with her and took care of her affairs, to the exclusion of other business opportunities (R. 121-2, 693-5, 428, 1294, 68, 681, 64, 41-3, 50-3, 613, 183-4, 435-6, 294-6, 358-9, 659-60, 674-6, 135, 197-9, 201, 159-61, 277, 267, 131, 148, 235, 243). Decedent never denied the contract to anyone.

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[4] Pecuniary legacies of $7,150 and a few specified household objects of nominal value (R. 695-6).

[5] Similar to the factual situation involved, for example, in *Loffus* v. *Maw* [1862], 66 Eng. Repr. 544, 548, 3 Giff. 592, 604.

The District Court found that petitioner, in the last year alone of decedent's life, increased her estate by $60,000 (R. 1705-6).

Decedent died November 25, 1929, with petitioner's name on her lips (R. 243). The original will, which she had delivered to him eight years earlier, could not then be found, despite diligent search, and the conformed carbon copy, produced from the scrivener's files, was thereupon offered for probate in the New Jersey Prerogative Court as the copy of a lost will (R. 581-2, 1186). The respondent cousins herein, by their present counsel, opposed probate. The state court concluded, after a trial:

> "* * * for the purpose of this decision, it may be admitted that the will was duly executed; it was delivered to the proponent; he retained possession of it continuously thereafter until October 27th, 1929; until then it was Mrs. Calef's intention that that will should become effective upon her death; there was no undue influence used in procuring the execution of that will; and that the relations between Mrs. Calef and Mr. Neely were all that he claims and continued to be so until the end.
>
> "But I think it must be conceded that Mrs. Calef knew where the will was, even if she did not have the custody of it; she could, if she so desired, have obtained possession of it and destroyed it, at least after October 27th, 1929, and before November 16th, 1929, there being no doubt about access during that period; * * *
>
> "The presumption of destruction by the testatrix, *animo revocandi*, therefore prevails and the petition for probate will be dismissed." (*In re Calef's Will*, 109 N. J. Eq. 181, 199).

The New Jersey Court of Errors and Appeals thereafter affirmed this decision "for the reasons stated in the opinion filed in the court below" (*id.*, 111 N. J. Eq. 355). Reargument was denied, and on February 13, 1933, this Court

denied a petition for a writ of certiorari [*Neely* v. *Stacy, et al.*, 288 U. S. 606 (1933)], which was brought upon the ground that petitioner had been denied due process of law by the State court in erecting a *presumption* of revocation upon a second *presumption* of access to the will between October 27 and November 16, 1929—contrary to all the evidence that no one then knew where the will was or when it had disappeared,[6] there being no "access", logically, to a thing not shown to be in physical existence.[7]

The final decree of intestacy having judicially established decedent's breach of her contract to compensate petitioner by devise, this suit for relief in the nature of specific performance and the impressment of a trust upon the estate held by her representatives and distributees was instituted in 1933 in the District Court of New Jersey, there being present both requisite jurisdictional amount and diversity of citizenship (R. 7-19). Respondents moved to dismiss the complaint on various grounds (R. 19-22). *Three years* later, the motion was denied in an opinion by the District Judge (16 F. Supp. 839, R. 24-8), who held the complaint good in all respects. No appeal was ever taken from the order entered on that decision. Respondents then answered, denying generally the contract (R. 28-31). By order entered April 6, 1936, the District Court struck this denial as sham and in violation of Equity Rule 24 (then in force) [8] upon proof that respondents (by their present counsel) had judicially admitted the contract in the probate proceeding as one of the "*important facts which have been established*" in that case (R. 31-6). This order likewise was never ap-

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[7] "A double inference is thus based upon a most insecure and dangerous foundation." *Cf. Throckmorton* v. *Holt*, 180 U. S. 552, 585 (1901).

[6] The will had been placed with petitioner's own will in decedent's favor and certain of his securities, all of which vanished (R. 580-2, 1070-2, 1504-6).

[8] Now F. R. C. P. 11.

pealed. It framed the issues and settled the law of the case. Nevertheless, the District Judge at the trial a year later (1937) required independent proofs of the contract from nine disinterested witnesses,[9] besides the conformed carbon copy of the will itself, which contained the contractual promise (R. 1721-4). He then denied respondents' motion to dismiss at the conclusion of petitioner's case (R. 476). A year later (1938), on the submission of findings, the District Court ruled that existence of this judicially admitted contract was the *only remaining issue in the case,* and respondents' counsel agreed that this was so (R. 1580, 1583-6). Petitioner thereupon requested a finding of the judicial admission (R. 1614), which request the District Judge received and marked "See order of April 6, 1936" (R. 1556-8), although he subsequently stated that he had stricken the request (R. 1701).

A year later (1939), the District Judge filed a memorandum and brief findings, dismissing the bill on the alternate grounds: (1) no contract had been proved, and (2) petitioner had not performed (R. 1593). A decree of dismissal was immediately entered *ex parte* on January 23, 1939 (R. 1594). Petitioner thereupon duly moved, under F. R. C. P. 52 (b) and 59 (then in force), to vacate the decree and correct the findings of fact (R. 1594-1622). At the hearing, eight months later, the District Judge ruled that the requested finding of judicial admission of the contract would be allowed (R. 1684). However, he refused, a month later, to incorporate such finding in his final decision, after respondents' counsel advised that "the finding of fact, if put in, virtually would reverse your Honor's entire decision, * * *" (R. 1696-7).

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[9] Mrs. Clark (R. 694-5); Mrs. Colony (R. 50-2); Runyon (R. 427-8); Hume (R. 68-9, 202); B. Avery (R. 160-1, 183-4); Greer (R. 358-9); Wilcox (R. 197-199); Mrs. Cochran (R. 659-60, 674-5); Miss Fahrner (R. 235).

The District Court nevertheless found, in its amended decision of September 11, 1939, that decedent died November 25, 1929, leaving real and personal property in New Jersey and Massachusetts; respondents are her heirs and the domiciliary and ancillary administrators of her estate; she executed her aforesaid will on September 29, 1921, and delivered it to petitioner as custodian; probate of the carbon copy was denied by the State court on her death. The District Court further found that petitioner executed his own will as a mutual will in decedent's favor in the event he predeceased her; in December, 1928, she received a $250,000 inheritance which she commissioned petitioner to collect for her, and, *as a result of his efforts,* in 1929 she received cash distributions of $48,500, and real property was sold for $60,000 more than she would originally have taken; over the period 1921-1929, inclusive, decedent was estranged from the respondent cousins herein (R. 1702-6).

The District Court also found (over objection and despite prior rulings and concessions that these matters were irrelevant), that decedent loaned and advanced petitioner money against his receipt for speculation, to be repaid monthly;[10] his services were rendered in reliance on her generosity and the privilege of speculating in joint account with her;[11] in December, 1929, he went to Cuba with $50,000, stating he had closed out certain joint accounts and that certain people could make trouble for him;[12] *he*

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[10] $13,992 representing proceeds of a stock sale was so received, of which $9,200 was repaid in monthly installments (R. 484-7, 905, 936-43, 1005, 1044-8, 1215-6, 1400-1, 1897-9). Petitioner's total ascertained payments to decedent and for her benefit from his own monies over the period 1921-1929 were $55,598.09 (R. 745, 1889, 750-2, 1886, 1892, 753-4, 1890, 1204-5, 1068-9, 901, 1049-50, 981-5, 1449-51, 1027-8, 1065, 1839, 1847).

[11] There were no joint accounts. There was a single joint venture in General Motors (R. 1087-8, 981-5, 1449-51, 1027-8, 1839, 1847).

[12] The evidence does not support this finding (R. 538, 699).

attempted to obtain decedent's signature (while decedent was unconscious) to a will naming himself sole beneficiary;[13] he solicited the physician's wife (in 1929) to prevail on decedent to remember him by will;[14] and he received a deed to the New Jersey real property which on demand he reconveyed to decedent (R. 1702-6; *cf.* 1154, 1583-6, 700).

Appeal was taken to the Circuit Court of Appeals for the Third Circuit, where respondents' motion to dismiss as untimely was denied (110 F. (2d) 525, R. 1725). The Circuit Court then affirmed in a brief opinion, and held that petitioner had failed to sustain the "heavy burden" upon him to establish existence of the contract and his performance thereunder, because of the alleged effort of decedent's dressmaker to secure a will during decedent's last illness; conceding existence of the contract, petitioner did not perform, relied only on decedent's "generosity" and certain alleged (but unspecified) benefits, and did not meet the test of change of position requisite to the granting of specific performance; petitioner's visit to Cuba in 1929 (after the promisor's death), with $50,000[15] and certain trinkets (appraised at $243.50 and returned intact)[16] disproved his performance under the contract over the period 1921-1929.

The Circuit Court then held that the District Court's order of April 6, 1936, striking as sham respondents' denial of the contract, was error because respondents' prior judicial admission in the probate proceeding was allegedly based upon supposedly incompetent testimony; the Dis-

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[13] There was no evidence at all to support this finding (see R. 510, 690, 700).

[14] The District Court cut off contradictory proof as "immaterial" (R. 700), yet made the finding.

[15] *Cf.* the transaction in General Motors stock, in which petitioner in October, 1929, personally paid decedent's loss of $14,634.19, and for which he was never reimbursed (R. 981-5, 1027-8, 1087-8, 1449-51, 1839, 1847).

[16] R. 393-4, 442-8, 536.

trict Court's action three years later, after the trial had concluded, properly cured that "error" [although the record cited (R. 1633-83) shows that on the next page thereof (R. 1684) this was not so]; the terms of the contract were not sufficiently certain to decree specific performance thereof and the impressment of a trust [although the District Court had held they were (R. 24-7) and this decision was never appealed]; plaintiff has "unclean" hands [although the trial court had ruled, and respondents conceded, there was no issue except the contract (R. 1580, 1583-6)].

Specification of Errors to be Urged.

The court below erred:

1. In refusing to hold, contrary to decisions of this Court and of the New Jersey courts, that the contract was judicially admitted and was therefore not in issue.

2. In holding, contrary to determinations of State and District Courts, that the contract terms were not precisely established by the will, which had been duly executed, delivered to the promisee therein named, and which he thereafter retained and relied upon during the eight years of his performance, down to at least within a month of the promisor's decease.

3. In holding, contrary to law, that adequacy of consideration for the promise to devise could be re-examined judicially, and in ignoring the District Court's finding that the promisee's performance was of substantial benefit to the promisor.

4. In refusing to hold, contrary to the rule in the Second, Fourth, Fifth, Eighth and Tenth Circuit Courts of Appeals, that the District Court's order of April 6, 1936, striking the denial of the contract, which order was never appealed, established the law of the case.

5. In holding, contrary to the rule in this Court, and in the Sixth and Tenth Circuit Courts of Appeals, that petitioner was not entitled to a decree, although, relying on the promise, he had irretrievably changed his position and fully performed to the promisor's complete satisfaction, and no equities existed in favor of her estranged and remote heirs.

6. In holding, contrary to decisions of this Court, that petitioner, as plaintiff in a civil action, was bound to establish his case by more than a fair preponderance of the evidence, despite the District Court's ruling that he had done so, and in thereby depriving petitioner of the due process of law guaranteed him by the Fifth Amendment to the Constitution of the United States.

Reasons for Granting the Writ.

It is patent, from a restatement of the confused and conflicting findings and decisions below in this tortuous litigation, that a grave injustice has been done this petitioner. No proof of the contract was or could be stronger than execution by the promisor of the will containing her solemn obligation to devise "in return for his services rendered to me at a time when I most needed them" (R. 202, 1722-3). The rule in New Jersey (as elsewhere [17]) is that *this paper proved the contract* even though ineffective as a will [*Laune* v. *Chandless*, 99 N. J. Eq. 186, 187 (1926); *Kastell* v. *Hillman*, 53 N. J. Eq. 49, (1894)]. The District Court

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[17] *Bolman et al.* v. *Overall*, 80 Ala. 451 (1886); *Naylor* v. *Shelton*, 102 Ark. 30 (1912); *Maddox* v. *Rowe*, 23 Ga. 431 (1857); *Burmeister* v. *Hamman*, 208 Iowa 412 (1929); *Skinner* v. *Rasche*, 165 Ky. 108 (1915); *Hiatt* v. *Williams*, 72 Mo. 214 (1880); *Torgerson* v. *Hauge*, 34 N. D. 646 (1916); *Robinette* v. *Olsen*, 114 Neb. 728 (1926); *Woods* v. *Dunn*, 81 Ore. 457 (1916); *Emery* v. *Darling*, 50 Ohio 160 (1893); *Brinker* v. *Brinker*, 7 Pa. 53, 56 (1847); *Johnson* v. *McCue*, 34 Pa. 180 (1859).

so held (16 F. Supp. 839, R. 24-7). However, the Circuit Court of Appeals, ignoring this unanswerable proposition, held no contract was established, thereby creating a conflict with the local rule applicable [*Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938)].

The contract, thus established, was never breached or repudiated by the deceased promisor. The State court merely presumed she had revoked her will because it also presumed she had access thereto for a period of 20 days,[18] but there was no proof of such access, of repossession or of destruction *animo revocandi* [In re *Calef's Will*, 109 N. J. Eq. 181, 199, (1931); 111 N. J. Eq. 354 (1932), cert. denied *sub nom. Neely* v. *Stacy, et al.*, 288 U. S. 606 (1933)]. Consequently, since repudiation or rescission of the contractual obligation by the deceased promisor was never claimed or shown, her distributees and successors in interest are bound by her contractual obligation and are estopped to assert otherwise [*United States* v. *Stevens*, 302 U. S. 623, 627 (1938); *Mauck* v. *United States*, 94 F. (2d) 745 (C. C. A. 9th 1938)]. The Circuit Court of Appeals' decision is in conflict with these authorities.

Likewise, it is elementary that adequacy of consideration is not open to judicial inquiry, and that it was enough if petitioner's performance was satisfactory to the promisor over the life of the contract, however inadequate it may now seem to strangers. The Circuit Court of Appeals therefore could not question its sufficiency. This is the rule of New Jersey [*Johnson* v. *Hubbell*, 10 N. J. Eq. 332, 335 (1855); *Schutt* v. *Missionary Soc. of the Methodist Episcopal Church*, 41 N. J. Eq. 115 (1886)]; of the Tenth Circuit [*Brooks* v. *Yarbrough*, 37 F. (2d) 527, 534 (C. C. A. 10th,

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[18] The District Judge recognized this (R. 1519, 1606) although reversing himself subsequently (R. 1588).

1930)]; and generally the rule elsewhere.[19] The District Court recognized this when it held the *only* question in the case was the contract, and respondents' counsel agreed (R. 1153-4, 1580, 1583-4). Plainly, performance was not an issue. Nor could the Circuit Court disturb the unchallenged finding of the District Court that petitioner's performance benefited the decedent to the tune of at least $60,000 in the last year alone of her life (R. 1705-6). This was why decedent's repeated declarations were to the effect that petitioner, over the entire eight years of his performance, had been a "godsend" and "a port in every storm" (R. 131, 148, 64, 41-3, 50-3, 358, 435-6, 658-60, 164, 197-8, 267, 235, 107, 277, 243).

This left only the contract. However, that was not in issue under the pleadings, as framed by the order of April 6, 1936, entered a year prior to the trial and never appealed or vacated. The decision below, holding that this order should be ignored, and that issues could be reframed *after* trial and the complaint then dismissed (two years later) for failure to prove an issue hitherto non-existent, is contrary to decisions in the Second, Fourth, Fifth, Eighth and Tenth Circuits, that this order settled the law of the case [*Zadig* v. *Aetna Ins. Co.*, 42 F. (2d) 142, 144 (C. C. A. 2nd, 1930); *Dodd* v. *Union Indemnity Co.*, 32 F. (2d) 512 C. C. A. 4th 1929); *Merchants Ins. Co.* v. *Lilgeomont, et al.*, 84 F. (2d) 685, 688 (C. C. A. 5th, 1936); *Page* v. *Arkansas Natural Gas*

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[19] *Oles* v. *Wilson*, 57 Colo. 246 (1914); *Clark's Appeal*, 57 Conn. 565 (1889); *Burmeister* v. *Hamman*, 208 Iowa 412 (1929); *Lovett* v. *Lovett*, 87 Ind. App. 42 (1927); *Smith* v. *Cameron*, 92 Kan. 652 (1914); *Moore's Admr.* v. *Wager's Admr.*, 243 Ky. 351 (1932); *Berg* v. *Moreau*, 199 Mo. 416 (1906); *Burns* v. *Smith*, 21 Mont. 251 (1898); *Corcoran* v. *Kennedy*, 177 N. Y. App. Div. 63 (3d Dep't, 1917); *Kelley* v. *Devin*, 65 Ore. 211 (1913); *Bentley* v. *Lamb*, 112 Pa. 480 (1886); *Spencer* v. *Spencer*, 25 R. I. 239 (1903); *Brinton* v. *Van Cott*, 8 Utah 480 (1893); *Burdine* v. *Burdine's Exr.*, 98 Va. 515 (1900); *Alexander* v. *Lewes*, 104 Wash. 32 (1918); *Jefferson* v. *Simpson*, 83 W. Va. 274 (1919).

Corp., 53 F. (2d) 27, 31 (C. C. A. 5th, 1931); *Turner* v. *Kirkwood*, 62 F. (2d) 256, 259 (C. C. A. 10th, 1932)].

But even disregarding all this, the contract was judicially admitted, as the District Court held on three separate occasions (R. 36, 1557-8, 1585, 1684), as a fact solemnly established in prior litigation between the same parties. Respondents were estopped to shift their position subsequently and to assert otherwise (*Philadelphia Etc. R. R. Co.* v. *Howard*, 13 How. 307, 336-7 (1851); *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267-8 (1877); *Davis* v. *Wakelee*, 156 U. S. 680 (1895); *In re Allison's Est.*, 106 N. J. Eq. 55 (1930)]. They could not blow hot and cold (*id.*). The decision of the Circuit Court patently conflicts with these authorities.

Moreover, it has never been the law, as the Circuit Court held, that an admission to be effective must be based upon competent evidence.[20] On the contrary, admissions supplant other evidence and dispense with formal proof of facts often not otherwise available.

Disregarding all this, even had there been no will and positive proof of a newly executed will which omitted all provision for petitioner, no judicial admission of the contract and no striking of the denial thereof, under the facts and circumstances here disclosed—change of position, eight years' continuous performance to the promisor's satisfaction, substantial benefits to her in that through the prom-

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[20] The Circuit Court here again erred in applying the New Jersey law (N. J. R. S. 2:97-2), which did *not* seal petitioner's lips as to transactions with the decedent where the door had been opened wide by respondents' cross-examination [R. 1382, *Messinger* v. *Paterson Savings Inst.*, 91 N. J. L. 654 (1918); see also *Berryman* v. *Graham*, 21 N. J. Eq. 370, 372 (1869); *Boone* v. *Ridgway's Exrs.*, 29 N. J. Eq. 543, 545 (1878); *Monfort's Admr.* v. *Rowland*, 38 N. J. Eq. 181, 183 (1884), aff'd, 40 N. J. Eq. 281 (1885)], and where the counterclaim based on alleged misconduct was not withdrawn until the close of the case [R. 1154, N. J. R. S. 2:97-2; *Neuman* v. *Fantl*, 119 N. J. Eq. 351 (1936). See also *Sanderson* v. *Howell*, 121 N. J. Eq. 56, 58 (1936)].

isee's solitary assistance her remaining years were spent in her desired style and comfort, freed of worry and responsibility, while her resources were increased by at least $60,000—these facts, plus her own repeated declarations of her agreement to disinterested witnesses from virtually all over the country, lawyers, advisors, neighbors, trusted friends and servants, bring this case within the controlling decisions of this Court [*Brown* v. *Sutton*, 129 U. S. 238 (1889); *Townsend* v. *Vanderwerker*, 160 U. S. 171 (1895); *Whitney* v. *Hay*, 181 U. S. 77 (1901)], of the Sixth and Tenth Circuit Courts of Appeals [*Ohlendiek* v. *Schuler*, 299 Fed. 182 (C. C. A. 6th, 1924); *Brooks* v. *Yarbrough*, 37 F. (2d) 527 (C. C. A. 10th, 1930)], and of the New Jersey State courts [*Johnson* v. *Hubbell*, 10 N. J. Eq. 332 (1855); *Van Duyne* v. *Vreeland*, 12 N. J. Eq. 142 (1858); *Davison* v. *Davison*, 13 N. J. Eq. 246 (1861); *Schutt* v. *Missionary Soc. of the Methodist Episcopal Church*, 41 N. J. Eq. 115 (1886); *Pflugar* v. *Pultz*, 43 N. J. Eq. 440 (1887); *Young* v. *Young*, 45 N. J. Eq. 27 (1889); *Vreeland* v. *Vreeland*, 53 N. J. Eq. 387 (1895); *Riley* v. *Allen*, 54 N. J. Eq. 495 (1896); *Winfield* v. *Bowen*, 65 N. J. Eq. 636 (1903); *Lawrence* v. *Prosser*, 88 N. J. Eq. 43 (1917); *Danenhauer* v. *Danenhauer*, 105 N. J. Eq. 449 (1930); *Ochs* v. *Ochs*, 122 N. J. Eq. 143 (1937)]. The opinion of the Circuit Court consequently is in direct conflict with these decisions of Federal and State courts, where specific performance was decreed upon evidence far less conclusive than that here presented.[21]

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[21] The decisions of *Vreeland* v. *Vreeland*, 53 N. J. Eq. 387 (1895), *Cooper* v. *Colson*, 66 N. J. Eq. 328 (1904), and *Lings* v. *Urquhart*, 106 N. J. Eq. 506 (1930), cited by the court below, are readily distinguishable. In *Cooper* v. *Colson*, the promisee merely continued to perform her usual duties as housekeeper, the services were not unique, and the agreement rested in parol only. In *Lings* v. *Urquhart*, the only evidence of the contract was parol testimony of the promisee and his business associate, and the former's conveyance to the promisor (his wife, 20 years his junior) was found to be not in return for her promise to devise but in fact to avoid creditors. In *Vreeland* v. *Vreeland*, specific performance was decreed.

Likewise the District Court properly held the contract was specific, definite and certain, since its exact terms could be established by competent proof of the contents of the will therein referred to (16 F. Supp. 839, R. 24-7). In this it was clearly right, and the Circuit Court's decision to the contrary plainly conflicts with the New Jersey rule laid down in *Laune* v. *Chandless,* 99 N. J. Eq. 186, 187 (1926), *supra,* and *Kastell* v. *Hillman,* 53 N. J. Eq. 49, 50 (1894), *supra.* It was immaterial whether the promisor's estate subsequently diminished or increased. The contract was for the net residuary estate after certain specific deductions [*Van Duyne* v. *Vreeland,* 12 N. J. Eq. 142 (1858)], and this Court has plainly held equitable relief proper in such instance [*Ex Parte Simmons,* 247 U. S. 231, 239 (1918)].

Again, the Circuit Court ignored the local rule in holding that petitioner had "unclean hands". There was no pleading, proof or presumption of unconscionable conduct based upon actual knowledge or wilful fraud [*Vulcan Detinning Co.* v. *American Can Co.,* 72 N. J. Eq. 387 (1907); *Shotwell* v. *Stickle,* 83 N. J. Eq. 188, 193 (1914); *Journal Plaza Holding Co.* v. *G. H. L. Co., Inc.,* 107 N. J. Eq. 14, 18-19 (1930)]. Nor was there misconduct performed in the particular matter or transaction for which relief is now sought [*Neubeck* v. *Neubeck,* 94 N. J. Eq. 167, 170 (1922); *Griffin* v. *Whittemore,* 109 N. J. Eq. 204, 205 (1931)]. The events, late in 1929, complained of by the Circuit Court, by these tests do not sustain a claim of unclean hands, for they bear no relation either to the existence of the contract made in 1921 or to the promisee's performance thereunder for eight years until the promisors' decease, and the District Court properly ruled they were without materiality (R. 700, 1583). Suffice it to note here: the alleged attempt to procure a new will was not attributable to petitioner but (if at all) to decedent's seamstress for thirty years, who stoutly denied the accusation (R. 510, 690, 700). The new draft had been

prepared and left by a local judge who was summoned pending discovery of the carbon copy of the missing 1921 will in New York (R. 499-501, 451). Petitioner was an elderly layman who consulted the local judge for advice and who was overwrought with the grief and stress of the occasion (R. 581, 499-501, 690-1). Moreover, the money petitioner took with him to Cuba (in December, 1929) was from his own bank account, following the closing of his own brokerage accounts on the eve of the great panic and crash of October, 1929, after he had personally paid decedent's stock loss of $14,639.49 in General Motors common stock (R. 859, 981-5, 1449-51, 1027-8, 1065, 1087-8, 1839, 1847). Petitioner returned directly to this country where he permanently resides. The counterclaim against him was voluntarily withdrawn at the conclusion of the trial (R. 1154). And the "jewelry" to which the Circuit Court referred (trinkets appraised at $243.50) was packed in petitioner's bag by a servant without his knowledge and, when discovered, was voluntarily returned intact, with a detailed inventory to the administrator *pendente lite* (R. 383, 397, 404-10, 442-8, 535-6, 1821, 1734-6).

In conclusion, this was a plain civil action. There was consequently no "heavy" or extraordinary burden of proof upon petitioner. The District Court concluded he had established a *prima facie* case (R. 476). Respondents' proofs did not thereafter disturb it. The court held, and respondents conceded, that *if the contract was established, petitioner was entitled to a decree in his favor* (R. 1583-5).[22] But the contract was not even in issue!

[22] *"The Court:* There is only one factor in the whole case, isn't there?
Mr. Parsons: Yes sir. After all is said and done that one factor is was there a contract or was there not;" (R. 1153-4).
"The Court: If I find a contract here, you are going out of court a loser.
Mr. Parsons: No question of it Judge; no question of it." (R. 1583.)
"The Court: • • • and we find here that this contract was that upon the death of Mrs. Calef, Mr. Neely was to have her estate and upon the death of Mr. Neely she was to have his." (R. 1585.)

Plainly, the Circuit Court erred in imposing an extraordinary and additional burden of proof.[23] This additional requirement, unheard of in a civil action [*cf. Helvering* v. *Mitchell*, 303 U. S. 391, 397 (1938)], violated petitioner's right to due process of law under the Fifth Amendment to the Federal Constitution.

Conclusion.

Petitioner is entitled to a writ of certiorari addressed to the United States Circuit Court of Appeals for the Third Circuit, to review and reverse the final judgment in this cause.

Respectfully submitted,

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[23] *Cf. Miller* v. *Steele*, 153 Fed. 714, 721 (C. C. A., 6th, 1907); *McKeon* v. *Van Slyck*, 223 N. Y. 392, 397 (1918); *Flanagan* v. *Flanagan*, 209 N. Y. App. Div. 190, 191 (4th Dep't, 1924); 1 Schouler: Wills (6th ed.) Sec. 698; Pomeroy: Specific Performance (3rd ed.) p. 357.

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No. 499

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FRANK TENNYSON NEELY,

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INDEX.

Subject Index.

	Page
Petitioner's reply brief	1
I. Answering respondents' statement (pp. 5-9)	1
A. Petitioner's status	1
B. Parol testimony of the contract	3
C. The memorandum of October 15, 1925	7
D. The witnesses below	8
E. The special master's report	10
II. Answering respondents' argument (pp. 12-39)	12
A. Respondents' statement of the contract as an established and important fact constitutes a solemn judicial admission and estops a subsequent shift of position	12
B. Specific performance will be decreed under the State law where the contract is not in issue, is judicially admitted and is established by the will and by parol evidence	13
C. Petitioner performed over the life of the contract to the promisor's complete satisfaction	14
Conclusion	15

Table of Cases Cited.

Alexander v. *Lewes*, 104 Wash. 32	15
Allen v. *U. S. F. & G. Co.*, 269 Ill. 234	12
Allison's estate, In re, 106 N. J. Eq. 55	12
Beaver v. *Crump*, 76 Miss. 34	14
Berg v. *Moreau*, 199 Mo. 416	15
Brinton v. *Van Cott*, 8 Utah 480	15
Burdick v. *Grimshaw*, 113 N. J. Eq. 591	14
Burdine v. *Burdine's Exr.*, 98 Va. 515	15
Burmeister v. *Hamman*, 208 Ia. 412	15
Burns v. *Smith*, 21 Mont. 251	15

Page

Christy v. *Atchison, T. & S. F. Ry. Co.*, 233 Fed. 255 13
Christy v. *N. Y. Cent. & H. R. R. Co.*, 90 N. J. L. 540 12
City and County of Denver v. *Denver Union Water Co.*, 246 U. S. 178 11
Clark & Wilson Lumber Co. of Delaware v. *McAllister*, 101 F. (2d) 709 13
Clark's Appeal, 57 Conn. 565 15
Cleaves v. *Yeskel*, 114 N. J. L. 497 12
Cooper v. *Colson*, 66 N. J. Eq. 328 14
Davis v. *Wakelee*, 156 U. S. 680 12
Franke Mfg. Co. v. *Jefferson Electric Co.*, 106 F. (2d) 605 13
Haberman v. *Kaufer*, 70 N. J. Eq. 381 14
Illinois Cent. R. Co. v. *Norris*, 245 Fed. 926 13
Johnson v. *Wehrle*, 9 N. J. Misc. 939 14
Kelley v. *Devin*, 65 Ore. 211 15
Laune v. *Chandless*, 99 N. J. Eq. 186 13
Lings v. *Urquhart*, 106 N. J. Eq. 506 14
Lovett v. *Lovett*, 87 Ind. App. 42 15
Marsh v. *Mitchell*, 26 N. J. Eq. 497 12
Merlis v. *G. & M. Corporation*, 143 Atl. 139 15
McNamara v. *Bohn*, 108 Atl. 764 14
McTague v. *Finnegan*, 54 N. J. Eq. 454 14
Neely v. *Stacy*, 288 U. S. 606 12
Oscanyan v. *Arms Co.*, 103 U. S. 261 12
Safford v. *Barber*, 74 N. J. Eq. 352 15
Scaife v. *Western North Carolina Land Co.*, 90 Fed. 238 13
Schutt v. *Missionary Soc.*, 41 N. J. Eq. 115 15
Scott v. *Beole*, 111 N. J. Eq. 215 14
Smith v. *McHenry*, 111 Kan. 659 15
The E. A. Packer, 140 U. S. 360 11
United States v. *Stevens*, 302 U. S. 633 15
Vreeland v. *Vreeland*, 53 N. J. Eq. 387 13
Weyer v. *Weyer*, 106 N. J. Eq. 112 14

TEXT BOOKS CITED.

1 Greenleaf: Evidence (16th Ed.), Sec. 186, p. 314 12
Jones: Evidence (4th Ed.), Sec. 257, p. 489 12
9 Wigmore: Evidence (3d Ed.), Secs. 2588, 2590, 2591, 2593, 2594 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 499

FRANK TENNYSON NEELY,

Petitioner,

vs.

MERCHANTS TRUST COMPANY OF RED BANK, NEW JERSEY, AS ADMINISTRATOR OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, AND FREDERICK H. TARR, AS ANCILLARY ADMINISTRATOR IN THE STATE OF MASSACHUSETTS OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, AND MARY L. HODGKINS, HARRIET G. STACY, JAMES D. STACY, FANNY K. STACY, MARY S. STACY, ANNA S. LUFKIN, GILBERT C. McCORMICK, HARRY McCORMICK, LOLA ROBINSON, HETTIE M. MORSE, JENNIE M. SAYWARD, CLIFFORD E. STACY, FRED C. STACY, EVERETT STACY, WILLIAM A. HAMILTON, DORIS ALVORD, ALBERT J. McCORMICK.

PETITIONER'S REPLY BRIEF.

I.

Answering Respondents' Statement (pp. 5-9).

A. PETITIONER'S STATUS

The respondents throughout their brief have studiously endeavored to place the petitioner in the worst possible

light. Toward that end they have attempted to create the impression that he had always been a failure and that his business experience was unsavory.

We submit that the petitioner certainly has nothing to be ashamed of in his business record. Having been in business for many years, in the course of which the nation as a whole suffered several business depressions, Mr. Neely likewise had his ups and downs. But his record proves conclusively that he had real business acumen and that he knew how to manage investments.

Mr. Neely entered the publishing business in Chicago in 1883, later removing to New York where he developed an extensive business of publishing text books and the works of many prominent authors and served on a national publisher's committee (R. 163, 374, 1469-70). In 1899 his business was forced into bankruptcy, from which he was discharged in 1901 (R. 374-6, 1871-2). He thereupon entered a manufacturing business, which was forced into bankruptcy because of alleged patent infringements in 1903, but because the petition, through error, was made voluntary, he did not secure his discharge until 1917 (R. 375-6, 1471-3, 1872-3). Thereafter he was associated with the real estate house of S. Osgood Pell & Co., in New York, leaving it in 1916 to enter business for himself in the handling of large properties (R. 38-40, 377-9, 1339, 1474-9). By 1918, he had $44,000 of deposits in Boston (R. 834, 1933); in 1920 he deposited $16,937.20 in his New York account and purchased $11,000 of bonds (R. 1827, 1837). Between September 16, 1921, and July 11, 1922, he acquired $83,000 of bonds at Dillon-Read, of which he retained $35,000 after sales and cash withdrawals over this period of $10,770.08 (R. 1911). On November 16, 1921, he also purchased $8,600 of bonds from one Dilkes (R. 833-4, 1299, 1418, 1896). Over the period 1917-1920,

he also earned substantial commissions as coal broker, including one for $35,000 (R. 176-7, 377-80, 860-2, 1479-82). He was a member of numerous clubs. He had known Mr. Calef in his lifetime and had frequently visited at Sea Bright (R. 1160, 1468).

B. Parol Testimony of the Contract

The respondents have attacked the sufficiency of the petitioner's evidence of the contract between him and the decedent. At page 7 of the respondent's brief, it is expressly said:

> "* * * No witness stated definitely that Mrs. Calef had confirmed any precise agreement or arrangement with Neely. Other witnesses quoted her words which substantiated the statement that she never made any such contract."

Such a statement is not understandable in view of the many places in the Record in which witness after witness testified to the decedent's confirmation of her contractual arrangement with the petitioner.

Mrs. Clark testified, decedent told her in September 1921:

> "'* * * I have no money and yet he is helping me tremendously and I can't pay him' * * * that finally she had been able to arrange with Mr. Neely to take care of her affairs and look after her, * * * that the only way she could pay him was by looking out for his care and comfort and remembering him in her will, giving him—making it in his favor, making a will in his favor. She said 'I am going to make a will in Mr. Neely's favor and he is going to take care of me,' as I understood, for life, or forever, and make his home there, * * *" (R. 121, 694-5).

Petitioner testified on *cross examination by respondents* that on September 10, 1921, decedent gave him her written declaration (R. 1770):

> "* * * carrying out her proposal and agreement that if I would take care of her business and look after her business, she would compensate me by my having the deed to the house, and she would make a will giving me the property" (R. 1382).

Runyon testified that on September 16, 1921, when he took her acknowledgment to the deed, petitioner told him:

> "* * * she wanted to make—to deed the house over to Mr. Neely so that he could handle it, and also to make a will in his favor in view of the various things that had taken place." (R. 428).

Hume testified decedent told him a few days thereafter:

> "* * * She stated that owing to the fact that she had very little money at that time, she was not able to pay him for the services that he was performing for her and that therefore she desired all the property that she might have to go to him upon her death as compensation for the services that he was rendering for her. * * *" (R. 68).

The clause in the will naming petitioner residuary legatee "in return for his services rendered to me at a time when I most needed them" was drafted by the decedent herself (R. 202, 70).

Petitioner testified Hume told decedent in his presence on September 29, 1921:

> "* * * that she had told him that she was making this will under contract or a promise which she had made with me that she would make the will; that she wanted the will to so state explicitly that the will was made—or that she was making the will for the services which I had already rendered to her and had

promised to render to her in the future" * * * she said that is exactly the way she wished it." (R. 1291).

Mrs. Colony testified decedent told her in the winter of 1921-22:

> "She gave me to understand that there was very little left, and what there was was to go to Mr. Neely * * * She definitely said that Bagdad[1] was to go to Mr. Neely. * * * That's all she had left * * * at that time". (R. 51).

Avery, in response to the Court's question as to his recollection of anything "that would lead you to the conviction that they had come to an agreement with relation to each other's estates and particularly with relation I would say to remuneration by her to him for services rendered," testified:

> "There was Mrs. Calef's statement on at least two occasions and Mr. Neely's statement on one occasion when Mrs. Calef was present that they had executed reciprocal wills" (R. 183-4).

Warner testified that on June 9th or 10th, 1924, decedent told him:

> "* * * that she had no way of paying Mr. Neely for the services which he had rendered and could render in the future except by making a will and leaving her estate to him, which she said she had done * * * For the valuable services that he had rendered and was continuing to render to her" (R. 294-5).

Warner urged them on July 4, 1924, to go to California with him. He testified:

> "* * * she said it would be impossible for him to go because she had made an agreement with him to look after her affairs" (R. 296).

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[1] Decedent's home at Sea Bright, N. J.

Greer testified that decedent told him in the winter of 1925-26, in Florida:

> "* * * Mrs. Calef just volunteered the information that Mr. Neely had been a Godsend to her, she used that word, and that he had taken care of affairs, that they were badly mixed up, and that he had even loaned her money to meet obligations—she didn't mention any particular amount and that she had agreed with him and had made her will * * * in his favor. * * * she said that would compensate * * * him for all the work that he had done for her and the money that he had loaned her" (R. 358).

Mrs. Cochran testified decedent told her that winter:

> "* * * that she had an agreement with Mr. Neely, and he was to manage her affairs and take charge of her business and in turn she had made her will, giving him her property * * * she had agreed to make this will and give him her estate" (R. 659-60, 674-6).

Wilcox testified decedent told him in the summer of 1928:

> "'I do not know how I can ever repay him for all that he has done for me. * * * I have made a will leaving everything to Mr. Neely, as he is the one person who I feel is doing so much for me." (R. 198).

Wilcox further testified:

> "It was done because she felt she owed him for the work that he had done. *The Court:* For services? *A.* For services that he had rendered, yes. *The Court:* Yes. And therefore she made the will? *A.* Yes" (R. 199).

Avery testified decedent told him in September 1928:

> "* * * that there was no way in which she could pay him for what he had done, she feared he wouldn't be paid, that he was mentioned in her will * * * She repeatedly stated, but particularly on this occasion, that she was under the deepest obligation." (R. 183).

Mrs. Clark testified decedent told her in June 1929:

> "He has been a port in every storm" (R. 148).

Miss Fahrner testified decedent told her, with regard to her property:

> "* * * she felt that she should leave it to him because that was the only way she could repay him" (R. 235).

Respondents' present counsel (Mr. Parsons) stated in his brief filed in the New Jersey Prerogative Court in June, 1931:

> "'The following facts appear at the close of the proponent's case: 1. Mrs. Calef executed deed on September 16th, 1921, pursuant to contract with Neely that she would give him deed, make him residuary legatee in will in consideration of his past, present and future services to her and money advanced to her.'" (R. 1825-6).

Mr. Parsons again stated in his brief filed in the New Jersey Court of Errors and Appeals in June, 1932:

> "* * * a brief synopsis of *the important facts which have been established of the whole case* may be helpful. * * * 3. September 16, 1921. Mrs. Calef executes a deed for her property at Sea Bright to Neely *pursuant to contract with him to give him deed and make him residuary legatee in consideration of services and money advanced to her.* * * *" (R. 1824.)

C. The Memorandum of October 15, 1925 (R. 1073, 1897).

Throughout the respondents' brief by innuendo and by direct accusation, it is made to appear that the petitioner improperly appropriated to his own use large sums of the decedent's money. Particular reference is made at pages 6 to 7 of the respondents' brief to a "note" given by the petitioner to the decedent in which the petitioner certified to the receipt of $17,000 which he agreed to pay back.

A statement of the actual facts surrounding this transaction will clearly demonstrate that petitioner did nothing improper in regard to it.

On her husband's death in 1914, decedent acquired 200 shares of Richmond Ry. L. & P. Co. stock which he had purchased in 1911 for $4050 (R. 1112). As requested, petitioner effected their sale for her on October 23, 1923, for $13,992 net, or a profit of approximately $10,000 (R. 712-4, 1112). Decedent gave him the proceeds for investment on the understanding that he would repay her at the rate of $500 monthly, as she did not trust her judgment (R. 712-13, 844-7, 905, 936-41, 1044-9, 1400-1, 1897, 1969). At least $9200 was so repaid (R. 847, 1046, 1897-9), and the arrangement was confirmed in writing on October 15, 1925 (R. 1073, 1897). On that date, decedent paid petitioner $5000 "for contemplated speculations in Florida" (R. 1073, 1897). Over the objections of petitioner and Greer, decedent personally invested $4000 of this sum in a land development and lost it despite petitioner's efforts at collection (R. 356-7, 929-30, 1002-4, 1895-6). He then personally reimbursed her for half of her own loss and refunded the unexpended balance of $1000 (R. 929-30, 1002-4).

D. The Witnesses Below.

Respondents' attack on the adequacy of petitioner's evidence is difficult to understand in view of the meagreness of the testimony on behalf of the respondents and the quantity and high quality of the proof on behalf of the petitioner.

Only one of respondents' twenty witnesses (Johnson) testified to anything bearing even remotely on the contract, and respondents conceded the others were immaterial (R. 1560). Johnson stated (in 1937) that petitioner, in response to an impertinent question, told him at some

unspecified date sixteen years earlier (in 1921) that he relied on decedent's "generosity" as his compensation (R. 555).[2] There was no denial from decedent's lips of her contractual obligation.

The high calibre of petitioner's proof cannot be questioned: Coffin was president of S. Osgood Pell & Co. since 1913 (R. 39); Mrs. Colony, a grandniece of decedent (R. 40); Colony, the decedent's favorite and a war veteran (R. 61); Hume, an associate of Elihu Root and corporation counsel of Yonkers (R. 1187); Field, a member of the New York bar since 1888 (R. 99); Mrs. Castell, a next door neighbor in 1929 (R. 105); Mrs. Clark, the decedent's closest companion over the period 1916-1924 (R. 111-12, 125); Avery, a member of the New York bar and next door neighbor over the period 1922-1929 (R. 148-9, 154); Andreiev, a former army officer and the decedent's butler in 1928-29 (R. 188-9); Wilcox, a retired business man and member of the War Trade Board (R. 194); Mrs. Gorman, Hume's secretary for many years (R. 206); Williams and Keeler, public officials in New Jersey (R. 212, 215); Maxson, former New Jersey Banking Commissioner (R. 220); Miss Fahrner, the decedent's seamstress and companion over the period 1894-1929 (R. 226); Mrs. Richard, a friend over the period 1920-1929 (R. 269-70); Warner, brother-in-law of Mayor John Purroy Mitchell of New York and engineer for the New Haven, Erie, New York Central and Great Northern Railroads, the United Verde Copper Co. and the State of California (R. 291); Greer, a member of the bar and Florida business man (R. 354, 369); Runyon, the partner of former Governor Woerz of New Jersey (R. 1512); Mrs. Cochran, the daughter of a Judge

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[2] Respondents' counsel, on the oral argument in the Circuit Court of Appeals on March 18, 1940, stated that Johnson, subsequent to his testimony, pleaded guilty to embezzlement and had been sentenced to State's prison.

of the Kentucky Supreme Court (R. 655); Whitford, a household employe from 1893 to 1927 (R. 678-9); Braverman, a certified public accountant and chief examiner for the Department of Insurance and Banking of New Jersey (R. 737); Tarr, United States District Attorney for Massachusetts and a respondent (R. 277); Fuller, the partner of Mr. Justice Church, formerly of the New York Supreme Court (R. 1083).

E. The Special Master's Report.

The respondents have not only referred to the finding by the master that the petitioner had not accounted for some $41,000 of decedent's funds (respondents' brief, page 7), but also set forth in the appendix to their brief excerpts from the master's report (respondents' brief, pages 51-54).

We submit that there was absolutely no justification for the Order of Reference to a master, made by the District Judge on March 31, 1937 (R. 735).

When the defendants filed their Answer, it included a counterclaim. At the close of the case, counsel for the defendants abandoned the counterclaim. See R. 1154.

Nevertheless, hundreds of pages of testimony were taken by a master who interpreted Judge Fake's Order to mean that the plaintiff was under a duty to account *as trustee* for every dollar and every piece of property of Mrs. Calef which ever passed through his hands. Nothing could be more unfair.

Obviously, it was not the intention of the decedent that Mr. Neely should ever be called upon for such an accounting. No reasonable construction of the evidence could lead to any other conclusion.

Indeed, Judge Fake covered the situation completely during argument at R. 1586, where the following colloquy occurred:

"*The Court:* Do you cover a point like this in your argument or brief: 'The mere fact that he is unable to account with exactness might indicate corroboration of the fact that there was just such an agreement'.

"*Mr. Parsons:* I don't cover that at all.

"*The Court:* In other words, Mrs. Fake knows that everything I have goes to her, and we don't keep any accounts, one against the other. Therefore, when the master reports inability to account with exactness but nothing in the nature of what might be termed embezzlement, why isn't it all tending to corroborate there was such a contract?"

But even in the proceedings before the master, in which events going back sixteen years were examined, the petitioner fully bore his burden of proof.

Petitioner produced uncontradicted documentary proofs of payments by him to or for the decedent's account over the period 1921-1929 inclusive, aggregating $55,598.09, of which the master allowed only $1354.38, although respondents offered no contrary proofs whatsoever.

Petitioner duly filed 46 specific exceptions to the report (R. 1138-51), not one of which was ever ruled upon below. The District Court disregarded its plain duty in this regard: *City and County of Denver* v. *Denver Union Water Co.*, 246 U. S. 178; *The E. A. Packer*, 140 U. S. 360, 364-5; and the report was not even mentioned by the Circuit Court of Appeals.

The District Court did find that as a result of petitioner's efforts, decedent received cash distributions of $48,500 in 1929, and her Massachusetts real property was sold for $60,000 more than she had originally desired (R. 1705-6). There was no conflicting evidence or challenge anywhere of this finding, and respondents consequently twice conceded that performance was not an issue (R. 1153-4, 1583).

II.

Answering Respondents' Argument (pp. 12-39).

A. Respondents' Statement of the Contract as an Established and Important Fact Constitutes a Solemn Judicial Admission and Estops a Subsequent Shift of Position.

Respondents, at pages 26 to 28 of their brief, insist that the contract between the petitioner and the respondents was in issue and was not admitted as had originally been found by the District Judge. We respectfully refer the Court to our petition for writ of certiorari, pages 13 to 14, in which we have set forth the erroneous action of the District Court in ignoring its prior order to the effect that the contract had been admitted. That order was plainly correct in law and in justice.

Respondents' admission of the contract was not made as loose argument but as the solemn representation of an important fact "established of the whole case" in the highest state court in an attempt to sustain the defense of undue influence[3] in procurement of the will, and to petitioner's prejudice (R. 1824). They cannot now repudiate it as made in a printed brief by their present counsel: *Allen* v. *U. S. F. & G. Co.*, 269 Ill. 234, 241; *Jones: Evidence* (4th ed.) Sec. 257, p. 489; 1 *Greenleaf: Evidence* (16th ed.) Sec. 186, p. 314; 9 *Wigmore: Evidence* (3rd ed.) Secs. 2588, 2590, 2591, 2593, 2594. This is the rule of this Court: *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 263; *Davis* v. *Wakelee*, 156 U. S. 680, 689; and of the courts of New Jersey: *In re Allison's Estate*, 106 N. J. Eq. 55, 64-5; *Marsh* v. *Mitchell*, 26 N. J. Eq. 497; *Cleaves* v. *Yeskel*, 114 N. J. L. 497; *Christy* v. *N. Y. Cent. & H. R. R. Co.*, 90 N. J. L. 540,

[3] See *Neely* v. *Stacy et al.*, 288 U. S. 606, No. 622, October Term, 1932, at R. 17-20.

543. It is also the rule of the Fourth, Sixth, Seventh, Eighth and Ninth Circuit Courts of Appeal: *Scaife* v. *Western North Carolina Land Co.,* 90 Fed. 238, 240-241 (C. C. A. 4th); *France Mfg. Co.* v. *Jefferson Electric Co.,* 106 F. (2d) 605, 610, (C. C. A. 6th); *Illinois Cent. R. Co.* v. *Norris,* 245 Fed. 926, 931 (C. C. A. 7th); *Christy* v. *Atchison, T. & S. F. Ry. Co.,* 233 Fed. 255 (C. C. A. 8th); *Clark & Wilson Lumber Co. of Delaware* v. *McAllister,* 101 F. (2d) 709, 713 (C. C. A. 9th).

B. Specific Performance Will be Decreed Under the State Law Where the Contract Is Not in Issue, Is Judicially Admitted and Is Established by the Will and by Parol Evidence.

Respondents' statement of the law as to the enforceability of contracts such as that involved in this case, is based on cases which themselves prove the inapplicability of that statement of law to the facts of the present case.

Respondents' eleven local cases (brief pp. 16, 36) do not dispute the law as stated in the Petition for Writ of Certiorari. In two cases (*Vreeland* v. *Vreeland,* 53 N. J. Eq. 387 and *Laune* v. *Chandless,* 99 N. J. Eq. 186) specific performance was decreed on facts closely parallel to those here. In the *Laune* Case, where (as here) decedent executed a defective will setting forth the promised devise "In consideration for services rendered in keeping house for me since the death of my wife without any compensation", the Court said (p. 188):

> "* * * It is true that human ingenuity can devise by hypotheses to account for the creation of the instrument by reason of some other motive, but matters of judgment are not formed upon such a basis, as Lord Chancellor Thurlow said in *Fox* v. *MacKreth* 2 *Cox* 320. By every dictate of reason and common sense it is

> more likely that the decedent executed what he meant to be a will because he was under moral and legal obligation so to do."

In nine of respondents' cases (*McTague* v. *Finnegan*, 54 N. J. Eq. 454; *Cooper* v. *Colson*, 66 N. J. Eq. 328; *Haberman* v. *Kaufer*, 70 N. J. Eq. 381; *Weyer* v. *Weyer*, 106 N. J. Eq. 112; *Lings* v. *Urquhart*, 106 N. J. Eq. 506; *Scott* v. *Beola*, 111 N. J. Eq. 215; *Burdick* v. *Grimshaw*, 113 N. J. Eq. 591; *Johnson* v. *Wehrle*, 9 N. J. Misc. 939; *McNamara* v. *Bohn*, 108 Atl. 764) the alleged agreement rested *entirely* in parol, and in most of them was not even established by parol evidence. Three cases involved adopted children (*McTague* v. *Finnegan, Burdick* v. *Grimshaw, Scott* v. *Beola*); two involved natural children who are presumed in law to render services from filial devotion and duty (*Haberman* v. *Kaufer, McNamara* v. *Bohn*); two involved the mere continuation of routine duties by household servants who had an adequate remedy at law on *quantum meruit* (*Cooper* v. *Colson*: *Johnson* v. *Wehrle*). None is relevant here.[4]

C. Petitioner Performed Over the Life of the Contract to the Promisor's Complete Satisfaction.

The respondents, at pages 23 to 25 of their brief, again attack petitioner's performance under his contract with the decedent.

In this connection it is only necessary to cite decedent's repeated expressions of gratitude, satisfaction and solicitude for petitioner in the last year of her life, after the nine years of his faithful and uninterrupted performance (B. Avery, R. 160-1, 182-3; Tarr, R. 276, 281, 283; R. Field, R. 267-8; Mrs. Clark, R. 131, 148; Mrs. Castell, R. 107; Run-

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[4] *Beaver* v. *Crump*, 76 Miss. 34, 59, involved an adoption agreement to devise to the promisee "what he did not devise or bequeath to others," and is obviously without application.

yon, R. 429; Andreiev, R. 193-4; Fuller, R. 1087-8; Miss Fahrner, R. 235, 243). She was the sole judge; no one else could question the adequacy of petitioner's performance (*United States* v. *Stevens,* 302 U. S. 633; *Schutt* v. *Missionary Soc.,* 41 N. J. Eq. 115).[5] By her own statements, he had fully performed; by respondents' own cases, he was consequently entitled to a decree (*Safford* v. *Barber,* 74 N. J. Eq. 352, 362-3;[6] *Merlis* v. *G. & M. Corporation,* 143 Atl. 139).

Conclusion.

To reply to all the misstatements of fact and law in respondents' brief would require us to far exceed the proper limits of a reply brief before this Court. We, therefore, respectfuly request the Court to refer to the petition for writ of certiorari wherein most of the respondents' arguments have been answered in advance.

Petitioner respectfully submits that he is entitled to a writ of certiorari addressed to the United States Circuit Court of Appeals for the Third Circuit, to review and reverse the final judgment in this cause.

Respectfully submitted,

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[5] See also: *Clark's Appeal,* 57 *Conn.* 565, 572; *Lovett* v. *Lovett,* 87 Ind. App. 42; *Burmeister* v. *Hamman,* 208 Ia. 412, 416; *Smith* v. *McHenry,* 111 Kan. 659, 665; *Berg* v. *Moreau,* 199 Mo. 416, 436; *Burns* v. *Smith,* 21 Mont. 251; *Kelley* v. *Devin,* 65 Ore. 211; *Brinton* v. *Van Cott,* 8 Utah 480, 487; *Burdine* v. *Burdine's Exr.,* 98 Va. 515, 522; *Alexander* v. *Lewes,* 104 Wash. 32, 42.

[6] Cited by respondents as *Gifford* v. *Barber.*

FILED
DEC 7 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

No. 499

FRANK TENNYSON NEELY,

Petitioner,

vs.

MERCHANTS TRUST COMPANY OF RED BANK, NEW JERSEY, AS ADMINISTRATOR OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, ET AL.

PETITION FOR REHEARING.

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INDEX.

Subject Index.

Opinions Below 2
Jurisdiction 2
Grounds of Rehearing 3
Conflicts Involved 5
A. The decision of the Circuit Court of Appeals is in substantial conflict with applicable New Jersey decisions 5
B. The decision of the Circuit Court of Appeals is in substantial conflict with applicable decisions of this Court 8
C. The decision below of the Circuit Court of Appeals for the Third Circuit is in direct conflict with applicable decisions of the Circuit Courts of Appeal for the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits 9
Conclusion 12

Table of Cases Cited.

Brown v. Sutton, 129 U. S. 238..... 9
Brooks v. Yarborough, 37 F. (2) 527 (C. C. A. 10)..... 11
Crane-Johnson Co. v. Commissioner, 309 U. S. 692..... 3
Cleaves v. Yeskel, 104 N. J. L. 497..... 6
Christy v. N. Y. C. & H. R. R. Co., 90 N. J. L. 540..... 6
Christy v. A. T. & S. F. Ry. Co., 233 Fed. 255 (C. C. A. 8) 11
Clark & Wilson Lumber Co. of Del. v. McAllister, 101 F. (2) 709 (C. C. A. 9)..... 11
Davison v. Davison, 13 N. J. Eq. 246..... 7
Danenhauer v. Danenhauer, 105 N. J. Eq. 449..... 7

PAGE

Davis v. Wakelee, 156 U. S. 680 8
Dodd v. Union Indemnity Co., 32 F. (2) 512 (C. C. A. 4). 10
Dred Scott v. Sandford, 60 U. S. 393, 399 10
Erie R. Co. v. Tompkins, 304 U. S. 64 9
Fleisher Eng. & Const. Co. v. United States, 309 U. S. 693 3
Fidelity Union Trust Co. v. Field, No. 32 October Term, 1940 (311 U. S. .....) 5
Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 480 10
France Mfg. Co. v. Jefferson Electric Co., 106 F. (2) 605 (C. C. A. 6) 11
Griffin v. Whittemore, 109 N. J. Eq. 204, 205 8
Green v. Biddle, 21 U. S. 1, 17, 18 10
In re Calef's Will, 109 N. J. Eq. 181, 199; 111 N. J. Eq. 355, 288 U. S. 606 ..... 5, 6
In re Allison's Estate, 106 N. J. Eq. 55 6
Ill. Cent. R. Co. v. Norris, 245 Fed. 926 (C. C. A. 7) 11
Johnson v. Hubbell, 10 N. J. Eq. 332, 335 ..... 6, 7
Journal Plaza Holding Co. v. G. H. L. Co., Inc. 107 N. J. Eq. 14, 18-19 8
Johnson v. U. S. Shipping Bd. Emergency Fleet Corp., 279 U. S. 819 10
Kastell v. Hillman, 53 N. J. Eq. 49 5
Knickerbocker Life Ins. Co. v. Pendleton, 115 U. S. 339.. 10
Laune v. Chandless, 99 N. J. Eq. 186, 187 5
Lawrence v. Prosser, 88 N. J. Eq. 43 7
Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 310 U. S. 655 3
Marsh v. Mitchell, 26 N. J. Eq. 497 6
Merchants Ins. Co. v. Lilgeomont, 84 F. (2) 685 (C. C. A. 5) 10
Messenger v. Anderson, 225 U. S. 436 10
New World Life Ins. Co. v. United States, 310 U. S. 654.. 3

PAGE

Neuberger v. Commissioner, 310 U. S. 655 3
Neely v. Stacy, 288 U. S. 606 6
Neubeck v. Neubeck, 94 N. J. Eq. 167, 170 8
Ochs v. Ochs, 122 N. J. Eq. 143 7
Oscanyan v. Arms Co., 103 U. S. 261 ..... 9, 11
Ohlendiek v. Schuler, 299 Fed. 182, cert. den. 266 U. S. 608 (C. C. A. 6) 11
Pflugar v. Pultz, 43 N. J. Eq. 440 7
Philadelphia etc. R. Co. v. Howard, 54 U. S. 307 8
Page v. Arkansas Nat. Gas Corp., 53 F. (2) 27 (C. C. A. 8) 10
Republic Steel Corp. v. N. L. R. Bd., 310 U. S. 655 3
Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202, 206 5
Riley v. Allen, 54 N. J. Eq. 495 7
Railway Co. v. McCarthy, 96 U. S. 258 8
Schutt v. Missionary Society, 41 N. J. Eq. 115 6
Schutt v. Missionary Society, 41 N. J. Eq. 115 7
Shotwell v. Stickle, 83 N. J. Eq. 188, 193 8
Security Mut. Life Ins. Co. v. Prewitt, 202 U. S. 246, 248. 8
Scaife v. Western N. C. Land Co., 90 Fed. 238 (C. C. A. 4) 11
Thompson, Trustee v. Magnolia Pet. Co., 308 U. S. 630.. 3
Townsend v. Vanderwerker, 160 U. S. 171 9
Turner v. Kirkwood, 62 F. (2) 256 (C. C. A. 10) 10
The Amiable Isabella, 19 U. S. 1, 50, 65 10
United States v. Stevens, 15 F. Supp. 139, 89 F. (2) 151, 302 U. S. 666, 623 ..... 3, 9
Van Duyne v. Vreeland, 12 N. J. Eq. 142 7
Vreeland v. Vreeland, 53 N. J. Eq. 387 7
Vulcan Detining Co. v. American Can Co., 72 N. J. Eq. 387 8
White vs. Texas, 309 U. S. 631 3
Winfield v. Bowen, 65 N. J. Eq. 636 7
Whitney v. Hay, 181 U. S. 77 9

PAGE

Young v. Young, 45 N. J. Eq. 27 7
Zadig v. Aetna Ins. Co., 42 F. (2) 142 (C. C. A. 2) 10

OTHER AUTHORITIES CITED.

8 Hughes: Federal Practice Sec. 6302, p. 549 6
Rule 38 (4) (a) 4
Rule 38 (5) (b) 2, 4, 12
Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347 (a)). 2

Supreme Court of the United States

OCTOBER TERM, 1940

No. 499

FRANK TENNYSON NEELY,

Petitioner,

vs.

MERCHANTS TRUST COMPANY OF RED BANK, NEW JERSEY, AS ADMINISTRATOR OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, AND FREDERICK H. TARR, AS ANCILLARY ADMINISTRATOR IN THE STATE OF MASSACHUSETTS OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, AND MARY L. HODGKINS, HARRIET G. STACY, JAMES D. STACY, FANNY K. STACY, MARY S. STACY, ANNA S. LUFKIN, GILBERT C. McCORMICK, HARRY McCORMICK, LOLA ROBINSON, HETTIE M. MORSE, JENNIE M. SAYWARD, CLIFFORD E. STACY, FRED C. STACY, EVERETT STACY, WILLIAM A. HAMILTON, DORIS ALVORD, ALBERT J. McCORMICK.

PETITION FOR REHEARING.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Frank Tennyson Neely, petitioner, prays that a rehearing be granted of his petition for certiorari herein, which

was denied by this Court on November 18, 1940, wherein he sought to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered on June 29, 1940 (which became final upon denial of his petition for a rehearing thereof on September 11, 1940) and in support thereof he respectfully shows:

Opinions Below.

The opinion of the District Court denying the motion to dismiss the complaint, is reported in 16 F. Supp. 839 (R. 24-7) and its opinion dismissing the bill after trial is reported in 26 F. Supp. 130 (R. 1588-93). The opinion of the Circuit Court of Appeals denying the motion to dismiss the appeal is reported in 110 F. (2) 525 (R. 1725), its opinion affirming the District Court is reported in 113 F. (2) 953 (R. 1729-33) and its opinion denying the petition for rehearing is unreported (R. 1737-8). The petition for certiorari was docketed on October 10, 1940 and was denied without opinion on November 18, 1940 (No. 499 October Term, 1940, 311 U. S. ...). This petition is filed within less than twenty-five days thereafter, under Rule 33.

Jurisdiction.

The jurisdiction of this Court was invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347 (a)) and Rule 38 (5) (b) of the Rules of this Court. This Rule provides:

> "A review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following while neither con-

trolling nor fully measuring the court's discretion, indicate the character of reasons which will be considered. * * *

"(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been but should be settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision".

It is respectfully submitted that the present case is directly analogous to *United States v. Stevens*, 15 F. Supp. 139, 89 F. (2) 151, certiorari granted in 302 U. S. 666 and decision below reversed in 302 U. S. 623, and that, as in the *Stevens* case, the petition for certiorari should be granted and the decision below reversed upon the ground that it is in substantial conflict with applicable local decisions, as well as in conflict with the decisions of other circuit courts of appeal and with applicable decisions of this Court.[1]

Grounds of Rehearing.

1. This Court has overlooked or misapprehended the fact that the decision below is directly in "substantial conflict" with applicable New Jersey decisions, and with decisions of this Court and of the Second, Fourth, Fifth,

[1] Cf. *Thompson, Trustee v. Magnolia Pet. Co.*, 308 U. S. 630; *White v. Texas*, 309 U. S. 631; *Crane-Johnson Co. v. Commissioner*, 309 U. S. 692; *Fleisher Eng. & Const. Co. v. United States*, 309 U. S. 693; *New World Life Ins. Co. v. United States*, 310 U. S. 654; *Republic Steel Corp. v. N. L. R. Bd.*, 310 U. S. 655, *Neuberger v. Commissioner*, 310 U. S. 655 where petitions for rehearing were granted at the October Term, 1939; *Milk Wagon Drivers Union v. Meadowmoor Dairies Inc.*, 310 U. S. 655 where a *second* such petition was granted.

Sixth, Seventh, Eighth, Ninth and Tenth Circuit Courts of Appeal.

2. Such conflict is plainly made a ground for review on writ of certiorari by the express provisions of Rule 38 (5) (b) above quoted, pursuant to which the petition for certiorari was filed herein.

3. Such conflict has been the stated basis for granting certiorari in virtually every opinion of this Court at the October Term, 1940 published to date (Nos. 5, 16, 13, 50, 121, 8, 26, 15, 23, 24, 25, 27) and, in the absence of any declared abrogation of Rule 38 (5) (b), no other or different decision should follow in this cause (No. 499).

4. The printed petition for certiorari herein was duly filed on October 19th, 1940, and respondents' brief in opposition was filed on November 5th. On that date the Clerk of the Court telegraphed petitioner's counsel, pursuant to Rule 38 (4) (a):[2] "Reply brief accepted if received by November fifteenth." A reply brief accordingly was filed on November 15th which it is assumed was the date of submission to the Court pursuant to the aforesaid Rule.

Nevertheless the decision denying the petition was announced on Monday, November 18th. Since the Court was engaged in hearing oral arguments in five cases on the 15th,[3] Saturday the 16th was a conference day at which Monday's decisions were determined upon and the 17th was Sunday it would appear physically impossible for the several Justices to have examined the 180 authorities cited by the respective parties or the 478 record references contained in the briefs of the 2003 page record between the date of final submission and the date on which the decision was formally announced.

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[2] Rule 38 (4) (a) provides: "Timely reply briefs will be considered but distribution under this rule shall not be delayed pending the filing of such briefs."

[3] Nos. 34, 35, 38, 39, 40 October Term, 1940.

Conflicts Involved.

A. The decision of the Circuit Court of Appeals is in substantial conflict with applicable New Jersey decisions.

1. As set forth in the petition for certiorari, the contract to devise of which petitioner sought specific performance was embodied in the will itself (R. 202, 1722-3) which was drafted by the deceased promisor, duly executed by her in the promisee's presence, delivered to him as custodian and thereafter retained and relied upon by him down to within a month of her death when it disappeared.[4] The New Jersey rule is that this paper proved the contract, even though (because of disappearance of the original) ineffective as a will (*Laune v. Chandless,* 99 N. J. Eq. 186, 187; *Kastell v. Hillman,* 53 N. J. Eq. 49). This Court has overlooked or misapprehended the conflict created by the circuit court of appeals in holding, contrary to this settled rule of local law, that the contract was not thereby established (*cf. Ruhlin v. N. Y. Life Ins. Co.,* 304 U. S. 202, 206. See also *Fidelity Union Trust Co. v. Field* now awaiting decision, No. 32 October Term, 1940).

2. The certiorari petition similarly set forth a full statement of the evidence (pp. 4, 8, 13) showing that the deceased promisor, down to her last words, was devoted to petitioner and completely satisfied with his performance of the contract for nine years. The rule in these cases is that she alone was the sole judge of the adequacy and sufficiency of the consideration furnished for her promise, *i. e.* the services rendered by petitioner, and that no stranger

[4] Together with his own reciprocal will and his own securities (R. 580-2, 1070-2, 1504-6. *In re Calef's Will,* 109 N. J. Eq. 181, 199; 111 N. J. Eq. 355, 288 U. S. 606.)

to the contract can be heard to dispute them (*Johnson v. Hubbell,* 10 N. J. Eq. 332, 335; *Schutt v. Missionary Society,* 41 N. J. Eq. 115). The circuit court of appeals in purporting to reexamine petitioner's performance and in holding that it was defective was in plain conflict with the applicable local law. It also disregarded the trial court's conclusive finding (supported by substantial evidence and nowhere challenged) that petitioner's performance benefitted the deceased promisor in the last year alone of her life to the extent of $60,000 (R. 1705-6).

3. It was likewise established in a prior litigation between the same parties (*In re Calef's Will,* 109 N. J. Eq. 181, 111 N. J. Eq. 355, *Neely v. Stacy,* 288 U. S. 606)[5] that the respondents herein by their present counsel had strenuously urged to petitioner's prejudice the very existence of this contract now sued upon. The circuit court of appeals in holding that respondents were not conclusively estopped by their own prior judicial admission of the contract as an established fact from denying its existence in this action, created a substantial conflict with the local rule, both in equity and in law (*In re Allison's Estate,* 106 N. J. Eq. 55; *Marsh v. Mitchell,* 26 N. J. Eq. 497; *Cleaves v. Yeskel,* 104 N. J. L. 497; *Christy v. N. Y. C. & H. R. R. Co.,* 90 N. J. L. 540).[6]

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[5] Although certiorari was denied in that case on February 13, 1933 it was denied unquestionably because the federal constitutional question (denial of due process by the state court of last resort) was not raised until by motion for reargument in the highest state court which had then (unknown to petitioner) sent down the remittitur and consequently had lost jurisdiction to rule adversely upon the federal question. (See Respondents' brief in No. 622, October Term, 1932.)

[6] Cf. 8 Hughes: Federal Practice Sec. 6302, p. 549, quoting Mr. Justice Van Devanter: "Whenever we find such a conflict that, without more, leads to the granting of the petition, if the case be one in which a petition for certiorari will lie." (Hearings before a subcommittee of the Senate Committee on the Judiciary, 68th Cong. 1st Sess. on S. 2062 and S. 2061 Feb. 2, 1924, p. 29.)

4. It was likewise established that petitioner was not a next of kin; that he gave up other business opportunities, changed his mode of life and took up his abode with the promisor, devoting his time exclusively to the management of her affairs for a period of nine years which can no longer be restored to him; that his services were unique and not of readily ascertainable pecuniary value; that they consisted in collecting the promisor's assets, providing her with gifts and loans in order that she might continue to live in her accustomed style and comfort, working out her debts, caring for her and improving her property—all in reliance on the written promise of the residuary devise made to him. In holding that these facts, when coupled with the decedent's own uncontradicted admissions to nine disinterested witnesses of her obligation, did not constitute a contract specifically enforceable in equity, the court of appeals acted in substantial conflict with the applicable local decisions (*Johnson v. Hubbell,* 10 N. J. Eq. 332; *Van Duyne v. Vreeland,* 12 N. J. Eq. 142; *Davison v. Davison,* 13 N. J. Eq. 246; *Schutt v. Missionary Society,* 41 N. J. Eq. 115; *Pflugar v. Pultz,* 43 N. J. Eq. 440; *Young v. Young,* 45 N. J. Eq. 27; *Vreeland v. Vreeland,* 53 N. J. Eq. 387; *Riley v. Allen,* 54 N. J. Eq. 495; *Winfield v. Bowen,* 65 N. J. Eq. 636; *Lawrence v. Prosser,* 88 N. J. Eq. 43; *Danenhauer v. Danenhauer,* 105 N. J. Eq. 449; *Ochs v. Ochs,* 122 N. J. Eq. 143).

5. Likewise there was no objection to specific enforcement of the contract because it provided for the net residuary estate after certain specific ascertained deductions and the opinion of the circuit court of appeals to the contrary plainly conflicted with the local rule applicable (*Van Duyne v. Vreeland,* 12 N. J. Eq. 142).

6. The circuit court of appeals likewise, in determining (despite the absence of any pleading or proof of this af-

firmative defense) that petitioner should be denied relief because he had "unclean" hands decided in conflict with the applicable local rule that to establish this defense there must be unconscionable conduct based upon actual knowledge or wilful fraud (*Vulcan Detining Co. v. American Can Co.*, 72 N. J. Eq. 387; *Shotwell v. Stickle*, 83 N. J. Eq. 188, 193; *Journal Plaza Holding Co. v. G. H. L. Co. Inc.*, 107 N. J. Eq. 14, 18-19) or misconduct performed in the particular matter or transaction for which relief is now sought (*Neubeck v. Neubeck*, 94 N. J. Eq. 167, 170; *Griffin v. Whittemore*, 109 N. J. Eq. 204, 205). This court has misapprehended or overlooked this conflict—particularly in view of the record which shows that the counterclaim charging petitioner with misconduct was voluntarily withdrawn at the conclusion of the entire case; the trial court ruled that the entire record of petitioner's relationship with the decedent did not establish any impropriety in his handling of her affairs (R. 1586) and respondents conceded that there was no issue whatsoever in the case other than the contract—that if the contract was established, petitioner was entitled to a decree (R. 1153-4, 1583, 1585, cf. *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 248). Plainly the circuit court of appeals could not of its own motion inject for the first time on appeal an alleged issue of "clean hands" in the case as a bar to the relief requested.

B. The decision of the Circuit Court of Appeals is in substantial conflict with applicable decisions of this Court.

1. This Court has plainly held that parties cannot blow hot and cold in successive litigations (*Philadelphia etc. R. Co. v. Howard*, 54 U. S. 307; *Railway Co. v. McCarthy*, 96 U. S. 258; *Davis v. Wakelee*, 156 U. S. 680). The denial of certiorari is tantamount to an overruling of these decisions

and a rejection of the principle, firmly imbedded in our jurisprudence, that having once urged the contract to defeat petitioner in the prior probate proceeding, they can not, when suit for its enforcement is subsequently brought between the same parties, turn around and repudiate its very existence as an established "important fact."

2. This Court likewise had plainly held that the admission of counsel is binding *(Oscanyan v. Arms Co.,* 103 U. S. 261). Here the contract was judicially admitted in writing by respondents' present counsel in the probate proceeding (R. 31-6). All other issues herein excepting the contract were likewise flatly conceded by him on the record at the conclusion of the trial below (R. 1153-4, 1583, 1585).

3. This Court has also overlooked or misapprehended the application of its own decisions *(United States v. Stevens,* 302 U. S. 623; *Brown v. Sutton,* 129 U. S. 238; *Townsend v. Vanderwerker,* 160 U. S. 171; *Whitney v. Hay,* 181 U. S. 77) in which the relief herein requested was granted by this Court on facts parallel to those here. While these decisions were rendered prior to *Erie R. Co. v. Tompkins,* 304 U. S. 64, which declares the local law to be applicable, and involved the rule in Massachusetts, Wisconsin and the District of Columbia respectively, the local law involved in those cases was in fact identical with the New Jersey law invoked here.

C. The decision below of the Circuit Court of Appeals for the Third Circuit is in direct conflict with applicable decisions of the Circuit Courts of Appeal for the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits.

1. The order of the trial court of April 6, 1936 which struck respondents' denial of the contract and which was never thereafter vacated, modified or appealed settled the

law of the case and framed the issues remaining to be tried *(Zadig v. Aetna Ins. Co.*, 42 F. (2) 142 (C. C. A. 2); *Dodd v. Union Indemnity Co.*, 32 F. (2) 512 (C. C. A. 4); *Merchants Ins. Co. v. Lilgeomont*, 84 F. (2) 685, (C. C. A. 5); *Page v. Arkansas Nat. Gas Corp.*, 53 F. (2) 27 (C. C. A. 8); ***Turner v. Kirkwood,*** 62 F. (2) 256 (C. C. A. 10)). These cases were selected from the myriad available as subsequent to the decision of this court in *Messenger v. Anderson*, 225 U. S. 436. While a trial court may have the power to reverse a prior order during the pendency of the trial before it, the power is one to be sparingly and cautiously exercised only for good cause shown and in special circumstances *(id.)*. Here no evidence or claim was ever advanced during the trial that the judicial admission upon which the order of April 6, 1936 was entered was inadvertent, that it was unauthorized or even that it was contrary to the fact—and the evidence subsequently received merely tended to corroborate its correctness. Even if, as the circuit court erroneously held, the trial judge had power to reverse himself later, no case will be found anywhere which justified such complete disregard of the law of the case rule as to permit the reframing of issues and dismissal of the complaint for alleged failure to prove issues hitherto non-existent—*two years* after the taking of all evidence had concluded and the case had closed.

The sanctioning of this procedure by the denial of certiorari herein obviously is such plain error and denial of due process that the action of this Court in overlooking or disregarding the patent injustice created thereby is such as to be corrected upon rehearing by this Court *ex mero motu*[7] even irrespective of the direct and substantial

[7] *The Amiable Isabella*, 19 U. S. 1, 50, 65; *Green v. Biddle*, 21 U. S. 1, 17, 18; *Dred Scott v. Sandford*, 60 U. S. 393, 399; *Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339; *Johnson v. U. S. Shipping Bd. Emergency Fleet Corp.*, 279 U. S. 819; *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 480.

conflict with the decisions in the other circuits above referred to.

2. The decision of the circuit court of appeals likewise is in substantial conflict with the decisions in the sixth and tenth circuits in *Ohlendiek v. Schuler*, 299 Fed. 182, cert. den. 266 U. S. 608 (C. C. A. 6) and *Brooks v. Yarborough*, 37 F. (2) 527 (C. C. A. 10) where relief by a decree for specific performance and the impressment of a trust was granted although the contract in suit was not as here (1) admitted under the pleadings, (2) judicially admitted by respondents and (3) established by the written contractual language of the will itself.

3. Likewise the decision of the circuit court of appeals is in direct conflict with the many decisions since *Oscanyan v. Arms Co.*, 103 U. S. 261 upholding the conclusiveness of admissions by counsel *(Scaife v. Western N. C. Land Co.*, 90 Fed. 238 (C. C. A. 4); *France Mfg. Co. v. Jefferson Electric Co.*, 106 F. (2) 605 (C. C. A. 6); *Ill. Cent. R. Co. v. Norris*, 245 Fed. 926 (C. C. A. 7); *Christy v. A. T. & S. F. Ry. Co.*, 233 Fed. 255 (C. C. A. 8); *Clark & Wilson Lumber Co. of Del. v. McAllister*, 101 F. (2) 709 (C. C. A. 9)). Here this Court has again overlooked the established fact that (1) the contract was judicially admitted in the prior probate proceeding; (2) all else but the contract was expressly admitted on the record below. Plainly under these circumstances petitioner could not lawfully be denied a decree.[8]

[8] The Circuit Court of Appeals and the several Supreme Court services which summarized the certiorari petition all erroneously described the suit as seeking to enforce an alleged "oral" contract in complete disregard of the fact that the contract was reduced to writing and that the motion to amend the complaint to conform to such documentary proof was granted without objection (R. 465)—a patent error that may well have been overlooked in this Court.

Conclusion.

Concededly this case does not involve a public right, the construction of a federal statute, a claim by a governmental agency or a question of civil or religious liberty. The jurisdiction of this Court is nowhere defined however as limited to these classes of cases despite such seeming self imposed limitation. This case does involve six substantial conflicts with applicable local decisions, three such conflicts with applicable decisions of this Court and three such conflicts with the applicable decisions in at least seven of the circuit courts of appeal—although one supposedly is enough under Rule 38 (5) (b). It does involve the denial of substantial property and contractual rights to a private citizen of the United States, whose right to redress has been defeated by intemperate personal attacks made upon him by respondents, both below and in the brief filed in this Court, for the obvious purpose of beclouding an issue that is actually non-existent. This Court, under its plenary powers of supervision and as the last bulwark of rights of vested property should, it is respectfully submitted, grant a review of this cause to the end that substantial justice may be done and the petitioner's vested rights under his admitted contract may be protected.

The order of November 18, 1940 denying certiorari should be vacated, the petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted and the entry of judgment herein by the United States District Court for the District of New Jersey stayed until further order of the Court.

Respectfully submitted,

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We hereby certify that this petition is presented in good faith and not for delay.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 499.

FRANK TENNYSON NEELY,

Petitioner,

v.

MERCHANTS TRUST COMPANY OF RED BANK, NEW JERSEY, as Administrator of the ESTATE OF ELIZA A. S. CALEF, Deceased, and FREDERICK H. TARR, as Ancillary Administrator in the State of Massachusetts of the ESTATE OF ELIZA A. S. CALEF, Deceased, and MARY L. HODGKINS, HARRIET G. STACY, JAMES D. STACY, FANNY K. STACY, MARY S. STACY, ANNA S. LUFKIN, GILBERT C. McCORMICK, HARRY McCORMICK, LOLA ROBINSON, HETTIE M. MORSE, JENNIE M. SAYWARD, CLIFFORD E. STACY, FRED C. STACY, EVERETT STACY, WILLIAM A. HAMILTON, DORIS ALVORD, ALBERT J. McCORMICK,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

PAGE

Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit 1

Opinions Below 1

Grounds Upon Which the Petitioner Invokes the Jurisdiction of this Court 2

Statement 3

Argument 9

I. The present case presents no issues which warrant a review of this cause by this Court 9

II. No judicial admission of the existence of a contract is present 12

III. An enforceable agreement setting forth with precision the terms, consideration and mutuality was not proven 15

IV. The petitioner by his failure to perform the alleged contract has barred himself from any relief 23

V. The existence of the contract was in issue and was properly determined in the Courts below 26

PAGE

VI. The petitioner failed to prove that a refusal to enforce the alleged contract would work a fraud upon him, and that the services rendered were not compensable in a suit at law and so was not entitled to relief 29

VII. In an action to prove a parol contract of a decedent, clear and convincing proof of the existence and performance is required 35

VIII. Conclusion 38

Appendix 40

Excerpts From the Opinion of Vice Ordinary Maja Leon Berry, of the New Jersey Prerogative Court, Rendered in re Calef, 109 N. J. Eq. 181 40

Opinion of United States District Court Judge Fake 49

Excerpts From Report of Special Master Appointed by District Court Judge Fake 51

Opinion of Circuit Court of Appeals for the Third Circuit, October Term, 1939 55

Excerpts From New Jersey Revised Statutes 60

TABLE OF CASES CITED.

PAGES

Acquackanonk Building and Loan Association v. Parsonnet, 107 N. J. Eq. 48; 151 Atl. 865 24

Barry v. Ruskin, 99 N. J. Eq. 730; 133 Atl. 528 24

B. & B. Inv. Co., Inc. v. Kaufman, et al., 100 N. J. Eq. 411; 136 Atl. 186 24

Beaver v. Crump, 76 Miss. 34; 23 So. 432 22

Beck v. Occidental Life Insurance Co., 95 F. (2nd) 935 .. 28

Boulanger v. Churchill, 86 N. J. Eq. 96; 97 Atl. 947 30

Bredow v. Woll (Conn.), 149 Atl. 772 14

Brooks v. Yarbrough, 37 F. (2nd) 527 11

Burdick v. Grimshaw, 113 N. J. Eq. 591; 168 Atl. 186 36

Cadigan v. Crabtee (Mass.), 78 N. E. 412 14

City of Newark v. Lindsley, 114 Atl. 794 (not officially reported) 24

Cochrane v. McEntee, 51 Atl. 279 (N. J. Chancery) (not officially reported) 31

Cooper v. Carlisle, 17 N. J. Eq. 525 (not in Atlantic Reporter) 16, 21, 38

Cooper v. Colson, 66 N. J. Eq. 328; 58 Atl. 337 ..... 16, 21, 29, 31, 38

Danenhauer v. Danenhauer, 105 N. J. Eq. 449; 148 Atl. 390 ..... 25, 33

Erie R. R. Co. v. Tompkins, 304 U. S. 64; 82 L. Ed. 1188.. 11

Friedlander v. Lehr, 99 N. J. Eq. 680; 134 Atl. 316 24

Gifford v. Barber, 74 N. J. Eq. 352; 70 Atl. 371 24

Haberman v. Kaufer, 70 N. J. Eq. 381; 61 Atl. 976 ..... 16, 38

Habirshaw Electrical Cable Company v. Habirshaw, et al., 296 Fed. 875 14

In re Calef, 109 N. J. Eq. 181; 156 Atl. 475; affd. 111 N. J. Eq. 355; 162 Atl. 579; certiorari denied, 288 U. S. 606; 77 L. Ed. 981 2

PAGES

Johnson v. Wehrle, 9 N. J. Misc. 939; 156 Atl. 229 ...16, 32, 38

Kastell v. Hillman, 53 N. J. Eq. 49 19
Kohbrin v. Drazin, 97 N. J. Eq. 400; 128 Atl. 796 24
Kutschinski, et al., v. Thompson, et al., 101 N. J. Eq. 649; 138 Atl. 569 24

Laune v. Chandless, 99 N. J. Eq. 186; 131 Atl. 634 ...16, 19, 38
Lings v. Urquhart, 106 N. J. E. 506; 151 Atl. 391; affd. 109 N. J. Eq. 131, 156 Atl. 377 .....16, 33

McNamara v. Bohn, 108 Atl. 764 (N. J. Chancery) (not officially reported) 16, 38
McTague v. Finnegan, 54 N. J. Eq. 454, at page 461, 35 Atl. 542 .....16, 38
Merlis v. G. & M. Corporation, 143 Atl. 139 (N. J. Chancery) (not officially reported) 24
Messenger v. Anderson, 225 U. S. 436, 36 L. Ed. 1153 28

Neely v. Stacy, et al., 288 U. S. 606, 77 L. Ed. 981 2

Pileggi v. Thorn, 100 N. J. Eq. 585, 135 Atl. 796 24

Scott v. Beola, 111 N. J. Eq. 215; 161 Atl. 822 .....16, 38
Sichterman v. R. M. Hollingshead Company (Calif.), 4 Pac. (2d) 181 14

Thommessen v. Absecan Land Co., 98 N. J. Eq. 696; 130 Atl. 518 24

Veazey's Case, 80 N. J. Eq. 466; 85 Atl. 176 (New Jersey Court of Errors and Appeals) 12
Vreeland v. Vreeland, 53 N. J. Eq. 387; 32 Atl. 3 .....16, 20, 38

Weyer v. Weyer, 106 N. J. Eq. 112; 150 Atl. 232 .....16, 38
Wood v. Graves (Mass.), 11 N. E. 567 14

STATUTE CITED.

PAGES

N. J. R. S. 2:97-2 ..... 4, 12

COURT RULES CITED.

Federal Rules of Civil Procedure, Rule 26 (d) (3) 4

Rules of the Supreme Court, Rule 38, paragraph 5 (b) 10

OTHER AUTHORITIES.

Corpus Juris, Volume 58, page 1065, Section 316 23

Corpus Juris, Volume 64, page 1266, Section 1127 27

Wigmore on Evidence, Second Edition, Vol. 5, Section 2588 13

Wigmore on Evidence, 1923 Edition, Section 2590 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 499.

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Petitioner,

vs.

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Respondents.

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OPINIONS BELOW.

The opinion of the United States District Court for the District of New Jersey dismissing the bill of complaint is set forth at page 1588 of the Record below and is reported

in 26 F. Supp. 130. The opinion of the Circuit Court of Appeals affirming the judgment of the District Court is set forth at page 1729 of the Supplemental Record and is reported in 113 F. (2nd) 953. This cause is intertwined with and involves parties to "In Re Calef", 109 Equity 181, in which the decision ran against the present petitioner. The New Jersey Court of Errors and Appeals affirmed that case in 111 N. J. Eq. 355. This Court denied certiorari in Neely v. Stacy, et al., 288 U. S. 606.

GROUNDS UPON WHICH THE PETITIONER INVOKES THE JURISDICTION OF THIS COURT.

From the petition filed, confusion exists upon what specific grounds the petitioner invokes the jurisdiction of this Court to grant the writ for which he sues. Apparently the grounds are as follows:

1. That the decision of the Circuit Court is contrary to the decisions of this Court and of the New Jersey Courts, in holding that the contract was not judicially admitted but was an issue;

2. That the decision of the Circuit Court of Appeals was contrary to the decision of the State Courts and District Courts, in holding that the terms of the contract had not been proven precisely either by a will or other proof;

3. That the Circuit Court of Appeals decided contrary to the existing law that it could examine the adequacy of the consideration for the promise;

4. That the Circuit Court of Appeals by its opinion determined, contrary to the rules of other Circuit Courts, that an order denying the contract established the law of the case;

5. That the Circuit Court of Appeals in its opinion enunciated a contrary rule of law to that in other Circuit Courts of Appeals, when it held that petitioner was not entitled to a decree;

6. That the Circuit Court of Appeals enunciated in its opinion a rule of law which deprived the petitioner of due process of law, held that the petitioner had not established his case by clear and convincing evidence.

The statement of the case which follows hereafter disposes of each and every ground written down by the petitioner. In the petition and argument as contained in the moving papers, it is extremely difficult to determine upon what grounds the petitioner has written down the six reasons set forth. A review of the statement will, however, it is submitted, conclusively dispose of each ground.

STATEMENT.

The statement contained in the petition does not present an accurate, comprehensive or fair picture of the case in the lower Courts as developed under the evidence adduced. Indeed, a study of the petitioner's statement in conjunction with the opinions of Vice Ordinary Berry of the New Jersey Prerogative Court, Judge Fake of the District Court and Circuit Court Judge Biggs of the Circuit Court of Appeals compels a pause to determine whether the opinions discuss the same case as the statement.

Repeated references are made to that portion of the record in which are printed the depositions of Neely taken at Boston (R. 1159 to 1508). These depositions were taken in June, 1936, prior to the time of the trial. Neely himself appeared at the trial (R. 372). In the Boston depositions, Neely's counsel disregarded the provisions of the Evidence Act of New Jersey, which closes the mouth of

a party to an action who is attempting to prove a contract against a decedent's estate, N. J. R. S. 2:97-2. The Boston depositions are cited repeatedly as authority for statements of the petitioner. Neither the Federal District Court nor the Circuit Court of Appeals relied upon this deposition which was admitted by the Trial Judge (R. 1156 to R. 1159), in view of Federal Rules of Civil Procedure, Rule 26(d) (3), (erroneously stated by petitioner in the record to be Equity Rule Five (5) of this Court), which had been promulgated after the depositions had been taken. Practically every reference to the Boston depositions which is made by the petitioner is to portions which clearly contravene the New Jersey Statute.

The petitioner Neely was introduced to the decedent Mrs. Calef, by one Mrs. Clark when Neely was selling furs (R. 139). Neely's career prior to his introduction to Mrs. Calef was devious, dubious and questionable. He had been engaged in a publishing business for some period of time which wound up in bankruptcy in 1899 (R. 476). He then entered a manufacturing business which likewise ended in the bankruptcy court (R. 477), and finally filed his third petition in bankruptcy in 1917, three years before he was introduced to Mrs. Calef (R. 478). Neely established himself in Mrs. Calef's home, and by September, 1921 had obtained from Mrs. Calef a deed for her property (R. 426); had caused her to execute a will in his favor (R. 67); and in October procured a power of attorney which he used to close out her bank account and transfer the funds to his personal account. Neely continued to reside with Mrs. Calef until her death (R. 383). During her lifetime, Neely's sole occupation was principally stock speculation, either with securities or monies which belonged to Mrs. Calef (R. 1123). Mrs. Calef became ill and died in 1929. During this illness of Mrs. Calef, Neely systematically closed out the joint brokerage accounts and deposited the assets amounting to $50,000.00 in his own personal bank account. While Mrs. Calef lay on her death bed, Neely called Judge Truax

and asked him to draw a will for Mrs. Calef, who, at the time, was unconscious (R. 507 to 512). Another nurse saw the will which had been drawn, leaving everything to Neely. Neely requested this nurse to call him if Mrs. Calef became conscious, so she could sign a paper (R. 506). Neely, the very morning that Mrs. Calef died, called in another lawyer (R. 626).

Neely had claimed by his bill of complaint that the decedent had entered into a contract with him whereby in consideration of his acting as a business agent and manager of her affairs, Mrs. Calef had agreed to make him the residuary legatee of her estate, after certain bequests. In an endeavor to prove the existence of such a contract, certain witnesses (Hume, R. 66; Avery, R. 148; Willcox, R. 194; Warner, R. 290; Greer, R. 353; Clark, R. 110 and R. 692; Cochran, R. 655) were called to testify as to certain conversations they had with Mrs. Calef. No witness was able to testify as to any precise or definite contract. All had heard expressions of appreciation on the part of Mrs. Calef. Typical of their testimony is that of Avery who testified concerning a conversation with Mrs. Calef:

> "Q. Was it anything more than a sentimental desire to make a gift? Was it anything more than an expression of a grateful heart for services rendered? A. It was certainly that.
>
> Q. And that is as far as you can go with it? A. I am afraid I can't go any further than that because that was not the subject we were talking about, Mr. Neely. We were talking about her immediate future" (R. 183).

Neely himself wrote a letter during the very period of time he claimed that contract was in existence in which letter he stated, **"I am acting solely on behalf of Mrs. Calef and have made no charges of any kind against her for my services"** (R. 614; 1969-1970). The property which he re-

ceived by deed from Mrs. Calef was returned to her by his deed (R. 618-619; 1978). Monies which he claimed that he had paid on behalf of Mrs. Calef, he admitted by letter were repaid to him by her (R. 623; 1981). During the period of time which Neely claimed this contract was in existence, he gave to Mrs. Calef a note certifying that he had received from her $12,000.00, to be used in stock speculation and $5,000.00 for speculation in Florida, which money he agreed to pay back at the rate of $500.00 a month (R. 1044; 1897). He wrote numerous letters which indicated that there was no obligation on the part of Mrs. Calef to himself.

Many witnesses appeared for the defendants (Howland, R. 478; Dietz, R. 517; Johnson, R. 549; Bloxom, R. 590; Sweeney, R. 633; Reed, R. 563; Retaliatta, R. 532). Johnson, Vice President of a bank where Neely was negotiating a loan for Mrs. Calef, testified that he asked Neeley what his relationship with Mrs. Calef was. Johnson asked him,

> "How do you get paid?"

Neely replied,

> "I am doing this, then, if it is successful, I then rely on the generosity of the woman or whoever I do it for.
>
> "By the Court:
>
> "And did he say that in this particular instance, with reference to the relations of Mrs. Calef, that he was relying simply on her generosity? A. Yes, he was doing the same for her as he had done for Mrs. Soper (Mrs. Clark)" (R. 555).

At the close of the trial as the last witness, defendants offered an accountant who had examined the brokerage accounts of Mrs. Calef and Neely (R. 703 to 735). As a re-

sult of his testimony, the Trial Judge ordered a reference, wherein Neely was directed to render a full and complete account of all the monies and securities of Mrs. Calef which came into his hands or control. After voluminous testimony, the Master found that Neely had not accounted for $41,000.00 of funds of Mrs. Calef which reached his hands (R. 1137). Excerpts from the Master's report are set forth in the appendix to this brief. Neely has appeared personally and given his testimony before Vice Ordinary Berry of the New Jersey Prerogative Court, before Judge Fake of the District Court and before Special Master Fairlie in the Reference ordered by Judge Fake. Excerpts from their opinions are set forth in the appendix for the convenience of this Court.

Suffice it to say in this statement that Neely at the time that he met Mrs. Calef had been through bankruptcy three times; that he had no visible assets; that shortly thereafter he procured a deed, a power of attorney and a will from Mrs. Calef; that he gave her a note evidencing the receipt by him of $17,000.00 of her money, though he insisted throughout that she was impoverished and poor. He claimed that she had made a contract to will to him her residuary estate, in return for his management of her affairs. He admittedly occupied a position of trust and confidence. He neither accounted for nor showed payment to his benefactress of the $17,000.00 he admittedly received. As she lay dying, he caused a lawyer to draw a will naming him the sole beneficiary. He stood by while his friend, the seamstress, requested a nurse to guide the unconscious hand of Mrs. Calef in a signature to that will. He besought the aid of the wife of the attending physician to influence Mrs. Calef to make a will in his favor. He sought the aid of lawyers to procure the execution of a will. No witness stated definitely that Mrs. Calef had confirmed any precise agreement or arrangement with Neely. Other witnesses quoted her words which substantiated the statement that she never made any such contract.

Neely, even if such a contract had been made, did not perform his obligation under such alleged contract. Under his own signature, he admittedly received $17,000.00 for which he did not account. Through the medium of accountants and examination of the records of banks and brokerage houses, there was traced into Neely's hands before the death of his benefactress $50,000.00 of her funds. Even if such a contract had existed, his complete failure to faithfully perform such a contract which would entitle him to the aid of a court of equity is fully proven.

One other point arises. At an early stage of this litigation, the petitioner moved to strike from the answer, the denial of the existence of the contract (R. 31). This motion was based upon statements contained in a brief in the action instituted by Neely to probate a paper writing as a copy of the lost will. The Court granted this motion (R. 35-36). At the trial the petitioner, of course, bore the burden of proving his case and proceeded voluntarily to offer proof of the alleged contract and its performance. Without objection, the defendants offered proof of the nonexistence of such contract. During the course of the trial, on a motion, the Trial Judge stated that he would reconsider the order made. Briefs were submitted, and the Trial Judge stated that he would incorporate his ruling in the opinion (R. 1556 to R. 1558). The point was again brought up (R. 1572 to R. 1579) wherein the Court stated, "I held it to the end of the case, didn't I?". Again (R. 1633) after the decision of the Court, the argument was brought up, and the Court held that he had concluded the question in his opinion. The Court said, "I found that the evidence was not sufficient" (R. 1636). After all the arguments, the amended findings of fact were entered (R. 1702 to R. 1706). In the amended findings of fact, the Trial Court found:

> "No contract was entered into between the plaintiff and the defendant on or about September 10, 1921,

> or at any other time, setting forth definite terms or conditions of employment, specifying any particular service to be rendered on the part of the plaintiff and on the part of the defendant specifying with what consideration the decedent was to pay the plaintiff".

The record is clear that the Trial Court reversed himself upon the order directed to the answer. Under the opinion of the Trial Court, however, such action was not necessary since the Trial Court found as a fact that there was no contract setting forth definite terms or conditions of employment, specifying particular services to be rendered by the plaintiff, or specifying particularly the consideration (R. 1704). The Trial Court further found as a fact that the plaintiff rendered his services in reliance upon the generosity of Mrs. Calef, and for the privilege of using the latter's funds in speculation. These findings of fact are incorporated in the opinion (R. 1589 to 1590). The Trial Court concluded:

> "It therefore appears that even if Mrs. Calef did enter into an agreement, as alleged, with Neely, he has not performed the terms and conditions thereof, with which he was burdened" (R. 1590).

ARGUMENT.

I.

THE PRESENT CASE PRESENTS NO ISSUES WHICH WARRANT A REVIEW OF THIS CAUSE BY THIS COURT.

Petitioner herein alleged that the decedent entered into a contract, in which she agreed to leave to him the residue of her estate after certain bequests, in return for his promise to perform certain services. He says that in reliance

upon that promise, he performed those services. The decedent left no will, and the petitioner filed this suit for relief in the nature of specific performance. In the previous proceeding, as will appear by the record of this Court, when the petitioner attempted to probate a carbon copy of this will, he laid his residence in the State of New Jersey, and it was a peculiarly local affair, of which the Federal Courts had no jurisdiction. After this Court had denied his petition for a writ of certiorari, he laid his residence in New York, and brought the present suit. His motives remain the same. He is still attempting to enrich himself with the assets of the estate of his benefactress. The estate is still subject to the jurisdiction of the Prerogative Court of the State of New Jersey. The alleged transaction, upon which the petitioner relies, took place in New Jersey. No Federal questions arise. It is peculiarly local in character, and it is submitted it is governed by the State decisions. The reports of New Jersey are replete with decisions which have enunciated a well settled and clearly defined doctrine of law applicable to similar facts.

By Paragraph 5 of its Rule 38, this Court has stated that a review on writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. The statement in petitioner's moving papers contains no special nor important reason why a writ should be granted.

Under subdivision B of Section 5 of this rule, further instances are mentioned where the decision of a Circuit Court of Appeals may be reviewed. It is submitted that in the instant case, the decision of the Circuit Court of Appeals is in direct accord with the State decisions. This is evidenced by the citation in the opinion of the Circuit Court of leading decisions of the Courts of the State of New Jersey. No Federal question is involved. It is true that the petitioner has urged that the Circuit Court of Appeals, in its decision, has decided questions at variance with the decisions of other Circuits. It is submitted, that

in the instant case, this is immaterial since the question is peculiarly local in character. However, every case cited by the petitioner in his brief has been examined and the respondents are unable on an examination of these cases to find any decision of a Circuit Court of Appeals which is in conflict with the present decision. Indeed, the petitioner has cited cases which are in direct accord with the decision, review of which is sought.

In *Brooks* v. *Yarbrough*, 37 F. (2d) 527, from the 10th Circuit, cited several times by the petitioner, the Court uses the identical words so prevalent in the jurisdiction of New Jersey, holding that to sustain such an oral contract, the evidence "must be clear, satisfactory and convincing, and must establish a contract beyond a reasonable doubt."

This Court has held that, in such instances, the local law should be followed.

> *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188.

The very evil which the last cited case pointed out is present in the instant case. After Neely had failed in his effort in the Courts of New Jersey to probate the will, he removed himself to New York and instituted his action in the United States District Court.

This Court, in Erie R. R. Co. v. Tompkins, supra, stated, at page 76, as follows:

> "Through this jurisdiction, individual citizens willing to remove from their own state and become citizens of another might avail themselves of the Federal rule."

Justice Brandeis, in his opinion (p. 78), further says:

> "The law to be applied in any case is the law of the State, and whether the law of a State shall be declared by its legislature in a statute, or by its highest court in a decision is not a matter of Federal concern. There is no Federal general common law".

From the statement of the facts presented heretofore, it must be apparent that this case involves peculiarly local law. The decision of the Circuit Court of Appeals was in strict accord with the local law.

It is respectfully submitted that nowhere in the record is there a determination of any question in the case which is repugnant to the controlling decisions of the Courts of New Jersey. The opinion of the Circuit Court of Appeals on its face not only follows the local law but is grounded upon leading decisions of the local Courts.

II.

NO JUDICIAL ADMISSION OF THE EXISTENCE OF A CONTRACT IS PRESENT.

Under the first specification of errors, the petitioner charges that the Circuit Court of Appeals refused to hold in accordance with the decision of this Court and of the New Jersey Court that the contract had been judicially admitted. This argument is based upon the fact that in the previous attempt of this petitioner to probate a carbon copy of the will of 1921, the heirs in their brief filed with the Court of Errors and Appeals reviewed the evidence and made certain assumptions. Circuit Court Judge Briggs in his opinion succinctly and forcibly disposed of this contention. (Supplemental Record, p. 1732.)

The character of the proceedings to probate as a lost will, permitted testimony by the proponent. N. J. R. S. 2:97-2 is not applicable in such proceedings (Veazey's case, 88 N. J. Eq. 46, 85 Atl. 176). The action of the Prerogative Court was a judicial inquiry to determine if Mrs. Calef had left a valid will. There it had been possible for Neely to testify at length as to conversations and transactions with the decedent. When Neely's attempt to probate this carbon copy proved abortive, he appealed to the New Jersey Court of Errors and Appeals. The respondents therein, through present counsel, filed the brief in which the evidence of Neely was reviewed and certain conclusions

drawn therefrom. These arguments in the brief were based entirely upon evidence which was inadmissible in the present case. The arguments were directed to an entirely different issue, the existence or not of a will. The existence of a contract was not in issue. Neely's lips were not closed as to this evidence.

Statements in a brief, it is respectfully submitted cannot be construed as judicial admissions. Professor Wigmore, in his work on evidence, defines a judicial admission as "an express waiver made in Court or preparatory to trial by the party or his attorney conceding, for the purposes of the trial, the truth of some alleged fact" (Wigmore on Evidence, Second Edition, Vol. 5, Section 2588). Statements in a brief on appeal do not meet the tests of this distinction as set forth by Professor Wigmore. Statements are made for trial and not in arguendo after trial. The statements are based upon premises which are non-existent in the present case. The statements were not made for the purpose of admitting a contested and controverted fact but as a premise for the legal argument. The testimony of Neely in the Prerogative Court had been evasive, contradictory and unbelievable.

Vice-Ordinary Berry had described the evidence of the petitioner before him thus:

> "Neely's testimony, considered in connection with his affidavit filed in support of the petition for probate, is so inconsistent, shifty and evasive that I regard it as almost totally unreliable" (109 N. J. E. 181, 189).

Searching among his numerous contradictions and evasions, an attempt was made to formulate certain factual conclusions upon which the legal argument could be made. In presenting the legal argument, inferences from Neely's evidence were submitted.

Counsel, in his argument before the Prerogative Court and the New Jersey Court of Errors and Appeals referred

to this testimony which was clearly inadmissible in the present proceedings.

These statements in the briefs cannot be construed to be judicial admissions on the part of the present defendants. It has been uniformly held that such arguments and discussions of evidence before appellate tribunals do not constitute judicial admissions in any sense of the word. Bredow v. Woll (Conn.), 149 Atl. 772 and the cases cited therein; Wood v. Graves (Mass.), 11 N. E. 567; Cadigan v. Crabtree (Mass.), 78 N. E. 412. Likewise in Sichterman v. R. M. Hollingshead Company (Calif.), 4 Pac. (2nd) 181, the verdict rendered in the first trial had been appealed. In the second trial the defendant endeavored to offer certain statements which were contained in the plaintiff's brief on the appeal from the first trial. The trial Court overruled the offer and the Supreme Court upheld this action with a statement that:

> "It was but the conclusion of counsel and not an admission during the trial of a cause which would preclude the plaintiff from offering new and additional testimony upon the occasion of a second trial."

In Habirshaw Electrical Cable Company v. Habirshaw, et al., 296 Fed. 875, an appeal was taken from an order in the Court below. One of the questions on appeal was urged to be moot because of statements made by counsel at the trial below. In holding to the contrary Circuit Judge Mayer of the Second Circuit said:

> "In addition to other reasons in this record which dispose of such a contention, we take notice of it because to agree with it would be to introduce a dangerous doctrine. It is important that in matters of this character counsel should have full freedom of discussion before the court. The opinion of counsel, whether expressed thoughtfully or casually, cannot be con-

> strued into admission of a fact, and, if counsel had not the opportunity of expressing their views frankly and freely, the court (and the parties) would be deprived of a complete understanding of the meaning and consequences of its decision. Counsel cannot bind clients in this way and plainly such a situation is entirely foreign to one where a fact is admitted or conceded. The rule, as stated by Wigmore, Sec. 2590, 1923 edition (and we italicize 'fact') is: 'The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, that is, the prohibition of any further dispute of the *fact* by him, and of any use of evidence to disapprove or contradict it.''

A thorough search of the authorities reveal no decision holding that in a distinct and separate cause of action a statement in a brief in another cause of action is a judicial admission of a contested fact.

In the instant case there was certainly no judicial admission. The Trial Court properly reversed its prior ruling. His action in so doing was approved by the Circuit Court of Appeals. The petitioner in his brief cites no authorities which hold that the action of the Trial Court or of the Circuit Court of Appeals, in determining that statements in a brief on appeal in a separate and distinct cause of action do not constitute a judicial admission in a later law suit involving different issues and additional parties, was incorrect.

III.

AN ENFORCEABLE AGREEMENT SETTING FORTH WITH PRECISION THE TERMS, CONSIDERATION AND MUTUALITY WAS NOT PROVEN.

The petitioner urges that the Circuit Court of Appeals erred when it found that the contract terms were not precisely established and in so doing followed a rule of law

which was contrary to the determinations of the State and District Courts. The Circuit Court of Appeals concluded:

> "* * * We conclude as did the learned District Judge that the appellant failed to sustain that burden of proof necessary to prove the existence of the contract between himself and Mrs. Calef" (Supp. Record 1731).

The decision of the Trial Court and of the Circuit Court of Appeals was in direct accord with the decisions of the jurisdiction of New Jersey. In *Cooper* v. *Carlisle*, 17 N. J. Eq. 525, Chancellor Zabriskie of the Court of Errors and Appeals said:

> "The contract proved must be clear, definite and certain both as to its terms and subject matter."

This pronouncement is followed with unanimity in a long line of cases.

Vreeland v. *Vreeland*, 53 N. J. Eq. 387; 32 Atl. 3.
McTague v. *Finnegan*, 54 N. J. Eq. 454; 35 Atl. 542.
Cooper v. *Colson*, 66 N. J. Eq. 328; 58 Atl. 337.
Haberman v. *Kaufer*, 70 N. J. Eq. 381; 61 Atl. 976.
Laune v. *Chandless*, 99 N. J. Eq. 186; 131 Atl. 634.
Weyer v. *Weyer*, 106 N. J. Eq. 112; 150 Atl. 232.
Lings v. *Urquhart*, 106 N. J. Eq. 506; 151 Atl. 391; affirmed 109 N. J. Eq. 131; 156 Atl. 377.
Scott v. *Beola*, 111 N. J. Eq. 215; 161 Atl. 822.
Johnson v. *Wehrle*, 9 N. J. Misc. 939; 156 Atl. 229.
McNamara v. *Bohn*, 108 Atl. 764.

The petitioner, when he filed this suit, asserted in the fifth paragraph of the bill of complaint that the petitioner and the decedent had agreed that in consideration of the services and assistance rendered to the decedent, and there-

after to be rendered, in the managment and care of her affairs, that she, the decedent, would make the petitioner her residuary legatee after provisions for certain legacies (R. 11). In accordance with the settled doctrine of the jurisdiction of New Jersey as declared in the foregoing decisions, it became encumbent upon the plaintiff to prove with precision the terms of this agreement by clear and convincing evidence.

As has been stated before, the plaintiff's lips by reason of the statute were closed. He was thus relegated to the testimony of third parties. Four witnesses: Clark (R. 694); Warner (R. 290); Greer (R. 535), and Cochran (R. 655) gave some testimony concerning a purported agreement. This testimony was nebulous, indefinite and uncertain. Greer said that Mrs. Calef had told him that "she had agreed with him and had made her will" (R. 353). Cochran said that Mrs. Calef had told her that she had an agreement with Neely to manage her affairs and she in turn had made her will giving him all her property (R. 675). Other witnesses: Avery (R. 193); Hume (R. 202), and Williams (R. 212), though they talked with Mrs. Calef, could only say that her expressions were those of gratitude.

As against this testimony there was the positive and definite testimony of Howland (R. 486); Johnson (R. 555); Dietz (R. 522); Bloxom (R. 596), together with the massive testimony of the witnesses who knew of certain events immediately prior and immediately succeeding the death of Mrs. Calef. As said by the Circuit Court, these events clearly indicated that the plaintiff knew that there was no contract and that he had no rights or claims against Mrs. Calef.

The petitioner in his brief is guilty of quoting half truths and distorting the evidence. When the evidence from the petitioner's own mouth and from his hands is considered, it is apparent that there was no contract. Petitioner, in this application, also relies upon the carbon copy of the will which has been heretofore rejected in this Court in

the denial of the writ of certiorari in 1933. The will (R. 1721 et seq.) is dated September 29th, 1921 and under the second paragraph recited as follows:

> "Second: All the rest, residue and remainder of my estate, real, personal or mixed of which I shall die seized or possessed, I give, devise and bequeath to my friend, F. Tennyson Neely of the City, County and State of New York in return for his services rendered to me at a time when I most needed them."

This paragraph upon its face clearly indicates that there was no existing contract as alleged by the petitioner in his complaint. The will distinctly refers to services previously rendered. No mention is made of an agreement to continue to render services.

When the circumstances which have been reviewed in the statement are considered in connection with this will, its evidential weight is small. At about the time that the will was procured, Neely likewise procured a deed from Mrs. Calef for her property. He admittedly reconveyed the property to her. He acknowledged over his own hand that Mrs. Calef had repaid monies to him which had caused him to retransfer the property to her. He acknowledged over his own hand four years later, that he was indebted to Mrs. Calef in the sum of $17,000.00 which he agreed to repay. He two years later, over his own hand, acknowledges that the work which he is doing for Mrs. Calef is done without any consideration.

All of these statements and acts on his part occurred after the execution of this will which, in its own terms, referred to a previous event or course of action. The will in no wise is evidential of the agreement set forth in the bill of complaint which alleged that the plaintiff had agreed to render further services. The will refers to past services alone.

Petitioner says that this will proved the contract according to the decisions of the State of New Jersey and

cites the cases of *Laune* v. *Chandless*, 99 N. J. Eq. 186, and *Kastell* v. *Hillman*, 53 N. J. Eq. 49. It is respectfully submitted that the will on its face, instead of proving an agreement for continuing services, disproves such an agreement. The cases cited by petitioner in his brief are not authorities for the holding given by the petitioner.

In *Laune* v. *Chandless*, 99 N. J. Eq. 186, the facts were dissimilar. The complainant had cared for the home of Chandless from 1906 until his death in 1922. She alleged that Chandless had agreed to leave her his property in payment of her services for caring for him. This testimony was corroborated by various witnesses. After mentioning these witnesses, Vice-Chancellor Bentley says:

> "But the oral testimony *was powerfully corroborated* by the production of an instrument purporting to be the Last Will and Testament of the decedent."

The Vice-Chancellor proceeds to discuss the will which was improperly executed, and concludes that it is corroborative testimony saying:

> "It tends to corroborate him when he produces the very instrument in question which by its terms declares it to have been done in consideration of the receipt of that benefit."

The entire decision turns upon the effect of the will as evidence and the Vice-Chancellor agrees that it is corroborative evidence.

In the instant case, the will, instead of corroborating the evidence on behalf of the plaintiff, is contradictory of that evidence since by its terms it refers to previous services and does not even mention services to be renderd.

In *Kastell* v. *Hillman*, 53 N. J. Eq. 49, a will devises to a son a farm:

> "In consideration of and for his services and assistance rendered to me in my estate by him up to the time of my decease."

Vice-Chancellor Pitney, later a member of this Court, made no such statement as alleged by the petitioner in his brief, that the paper proved the contract. He stated:

> "This clause is of itself evidence of the contract. In addition to that the parol proof is abundant."

Again, under the terms of the will in the Kastell case, there was a definite reference to services to be rendered up to the time of death which corroborated the evidence offered by the survivor.

In the instant case, the only evidence offered by Neely of the existence of a contract came from the lips of certain witnesses who differed among themselves and all of whose descriptions of the agreement differed from the contract alleged in the petition. The will itself did not even refer to a future contract. There was no evidence in the case of any contract which was precise in its terms and capable of enforcement.

The Courts of New Jersey have held repeatedly that a parol agreement to make a will must be clear, definite, unequivocal and mutual in its terms and must be clearly proven and plainly established. The reports of New Jersey abound in decisions defining the elements and quantum of proof requisite to establish an agreement between a decedent and the survivor to make a will. Of this vast number of cases, only two leading cases, which have been repeatedly cited, will be quoted.

Chancellor Megill in *Vreeland* v. *Vreeland,* 53 N. J. Eq. 387; 32 Atl. 3, specified the requisite items of proof:

> "But a parol agreement of this character, because of the situation and relations of the parties to it and

> the consequent opportunity for the perpetration of fraud, is regarded with suspicion, and, when its enforcement is sought, is subjected to close scrutiny. It must not only be mutual, but also definite and certain, both in its terms and as to its subject-matter, and it must be clearly proved. Cooper v. Carlisle and Brown v. Brown, supra. So, also, it must plainly appear that that which is alleged as part performance is referable to and was consequent upon the contracts alone, for the purpose of carrying it into effect. Eyre v. Eyre, supra; Pom. Spec. Perf., Sects. 108, 109."

In *Cooper* v. *Colson*, 66 N. J. Eq. 328, 330; 58 Atl. 337, Justice Fort, speaking for the Court of Errors and Appeals of New Jersey, says:

> "In every case, in order to take the case out of the statute on the ground of part performance, irrespective of other questions, two things are requisite. The terms of the contract must be established by the proofs to be clear, definite and unequivocal, and the acts relied on as part performance must be exclusively referable to the contract. * * * Most scrupulous care should be exercised by the courts in this class of cases, and especially where one of the alleged contracting parties is dead. An allegation of an agreement to convey is easily made, and casual conversations or jocular remarks of intent to devise or convey at death can readily be turned into serious import. * * * Such power should be exercised upon the most clear proof * * * of the contract to devise."

The indefiniteness of the contract of which proof was offered is apparent on its face. No person testified what services Neely was to render. No witness testified what bequests the decedent might make to friends and relatives. That she planned to change her will in those bequests was

admitted by Neely's own counsel to whom the news was conveyed by Neely himself (R. 87). According to petitioner's own brief, this contract was allegedly made at a time when Mrs. Calef was financially pressed. Through the death of her brother, Mrs. Calef received substantial funds. No proof is shown in the case that Mrs. Calef did not have a right to change the legacies, the amounts of the legacies or the legatees. Neely himself apparently recognized such a right because he himself arranged with Hume for a conference to write a new will.

In *Beaver* v. *Crump,* 76 Miss. 34; 23 So. 432, such a contract was held incapable of specific performance since it was elastic and uncertain and the testator, during his lifetime, had the right to either increase or diminish the residue of the estate as he wished.

The carbon copy of the will, upon which the petitioner relies so greatly, was admitted into evidence. By its terms it referred not to a future contract but to a past consideration. This was expressed in terms of gratitude rather than that of a debtor for services rendered under contract. The parol evidence on the part of the petitioner was indefinite, general and unconvincing. A precise contract was never proven. The effect of the carbon copy of the will was not to prove a contract but could be only evidential of a contract and, as stated, this evidence was contradictory of the contract charged in the bill of complaint.

It is submitted that the Circuit Court of Appeals in its decision ruled in accordance with the decisions of the State of New Jersey. There is no contradiction between the decision of the Circuit Court of Appeals and those of the local jurisdiction.

IV.

THE PETITIONER BY HIS FAILURE TO PERFORM THE ALLEGED CONTRACT HAS BARRED HIMSELF FROM ANY RELIEF.

Under this point, the petitioner has argued in a reverse construction of the opinion of the Circuit Court of Appeals, that the Circuit Court of Appeals inquired into the consideration given by the petitioner under the contract alleged.

This is an obvious misstatement of the reasoning of the Circuit Court. The Circuit Court in its opinion said:

> "Assuming, however, that there was a specific contract between the appellant and Mrs. Calef in the terms for which the appellant contends, nevertheless, his performance under that contract was not such as would entitle him to relief."

The petitioner charges that the Circuit Court of Appeals considered the sufficiency of the consideration rendered by Neely for the contract. This statement is specious, fallacious and upon its face, incorrect. The Circuit Court was not considering the consideration to be given by Neely but rather whether he on his side had performed the contract. It is axiomatic that the right to the relief of specific performance, or in the nature of specific performance, rests in the sound discretion of the Court of Equity. It will be granted only when the party seeking such relief comes into the court with clean hands and has fully performed, or is ready and able to fully perform.

> "In general a party seeking specific performance must show that he has performed, or offered to perform or is ready, able, and willing to perform, all the essential acts required by the contract" (58 C. J. 1065, Sec. 316).

See also:

Gifford v. *Barber,* 74 N. J. Eq. 352; 70 Atl. 371.
City of Newark v. *Lindsley,* 114 Atl. 794 (not officially reported).
Kobrin v. *Drazin,* 97 N. J. Eq. 400; 128 Atl. 796.
Thommessen v. *Absecan Land Co.,* 98 N. J. Eq. 696; 130 Atl. 518.
Friedlander v. *Lehr,* 99 N. J. Eq. 680; 134 Atl. 316.
Barry v. *Ruskin,* 99 N. J. Eq. 730; 133 Atl. 528.
B. & B. Inv. Co., Inc. v. *Kaufman, et al.,* 100 N. J. Eq. 411; 136 Atl. 186.
Pileggi v. *Thorn,* 100 N. J. Eq. 585; 135 Atl. 796.
Kutschinski, et al. v. *Thompson, et al.,* 101 N. J. Eq. 649; 138 Atl. 569.
Merlis v. *G. & M. Corporation,* 143 Atl. 139 (not officially reported).
Acquackanonk Building & Loan Association v. *Parsonnet,* 107 N. J. Eq. 48; 151 Atl. 865.

The Circuit Court of Appeals found that Neely had not fully performed the contract, which he alleged existed, even had such contract been actually made. It is submitted that the Court was completely justified in such determination. Neely claimed that he had a contract under which he was to care for and manage the estate of the decedent during her lifetime. At the close of the entire case, after evidence had been introduced by a public accountant that Neely had closed out joint accounts and transferred the funds to his personal account so that he was enriched by the sum of $50,000.00, an order of reference was directed. Both the testimony on this order of reference and the findings of the master are contained in the record. The testimony covers nearly four hundred pages (R. 737 to R. 1112). During the course of this testimony, it developed that Neely had sold securities of Mrs.

Calef and placed the proceeds in his own account; that he had borrowed monies from her to the extent of at least $17,000.00 and used them for speculation; that he had taken other securities of hers and transferred them to his individual accounts. It was conclusively shown that before she died and while she was in her last illness, he closed out various joint accounts and deposited in his personal account the sum of $50,000.00 and made no endeavor, in accordance with the order of the Court, to account for monies and assets which he had received from Mrs. Calef.

This was found by the Special Master in his report (R. 1113 to R. 1137). The Trial Court, it is respectfully submitted, necessarily found in the light of this report that there had been a breach by Neely of his obligation under the contract. The Circuit Court of Appeals affirmed the Trial Court and quoted with approval the statement by Vice-Chancellor Ingersoll in *Danenhauer* v. *Danenhauer*, 105 N. J. Eq. 449, 451, that a complainant might be afforded relief by equity by enforcing a parol contract in the instance of one who has completely performed, but that such a remedy is granted only to one

> "* * * who, induced by the agreement, has in good faith so performed it as to irretrievably change the situation of the parties to his disadvantage, to permit the other party to refuse fulfillment upon his part."

If, in the instant case, there was any contract, this contract has worked to the enrichment of the petitioner to the detriment of the estate. Petitioner, as a result of this contract, according to the master, is in possession of funds of the estate in the amount of $41,000.00 for which he has not accounted. The Circuit Court of Appeals acted in accordance with the evidence and properly affirmed the determinations of the Trial Court.

V.

THE EXISTENCE OF THE CONTRACT WAS IN ISSUE AND WAS PROPERLY DETERMINED IN THE COURTS BELOW.

The petitioner argues strenuously that because the Trial Court had stricken that part of the respondent's answer which denied the existence of the contract upon a motion based upon statements made in a brief in a separate action, that the issue of the contract was removed from the cause.

It is submitted that such an argument is erroneous. The petitioner bore the burden of proving his case which in the first instance depended upon the existence of the contract which he had pleaded. The terms of this contract were important. The petitioner fully recognized this obligation and in the trial of the cause proceeded to call some twenty witnesses. At the close of the petitioner's case, a motion to dismiss the complaint was made. This motion was based upon the failure to prove in a requested manner the existence of a parol agreement (R. 466). The Court interrupted counsel in the argument and said:

> "There was nothing in their testimony to show that there was a contract to make a will, was there?" (R. 472).

The Court further said in the argument:

> "The details of the agreement do not appear in the testimony of any witness" (R. 473).

At the close of the argument the Court stated that on examination of the cases, he might change his view but at the time the motion was denied (R. 476). The defendants then proceeded to call some fourteen witnesses who offered evidence that negatived the existence of the contract or testified directly to statements by either Mrs. Calef or Neely to the effect that there was no contract.

The entire case was fully tried upon the issue of the existence of a contract and its performance. It is true, there later developed the question of good conscience on the part of the petitioner. This, however, also entered into the performance of the contract. The records show that there was no objection to the offer of testimony by the defendants negativing the existence of the contract. The question of the previous order was fully discussed by the Trial Court on various occasions. The Circuit Court of Appeals referred to a fifty page discussion (R. 1633 to R. 1683). From the record itself, the Trial Court said:

> "I ruled against the proposition but I didn't rule that there wasn't such evidence before the court."

The Court explicitly stated at R. 1633:

> "I think there was one phase of the matter that I remember reversing."

There had also been a previous discussion in which the Court said:

> "It seems to me I reversed myself in that" (R. 1558).

By the record, the Court clearly stated its intention to reverse the order made. This intention was carried out by the Trial Court as stated by the Circuit Court of Appeals. As heretofore argued in this brief, the order was erroneous. The Trial Court at the time of judgment corrected this error. This act was completely within the authority of the Court.

In 64 C. J. 1266, it is said:

> "In a proper case, the court may amend, correct or otherwise change its findings and conclusions on its own motion."

Such action of the Court finds authority in Beck v. Occidental Life Insurance Co., 95 F. 2nd 935. The Circuit Court of Appeals of the Tenth Circuit stated that:

> "A court has power to correct a manifest error or a plain mistake of serious nature inhering in a previous decision."

In Messenger v. Anderson, 225 U. S. 436, 443; 36 L. Ed. 1153, this Court said:

> "That the phrase, 'law of the case', merely expresses the practice of courts generally to refuse to reopen what has been decided, and not a limit to their power."

It is to be remembered that in the instant case the trial was in the equity branch of the Court. The Court had, at all times, until judgment therein complete power and control over the case. The Court on its own statement asserted its right to reverse the previous order. The case was tried on the issue of the existence of the contract. The petitioner proceeded affirmatively to offer proof and endeavored to substantiate its existence and cross-examined the witnesses offered by the respondent on this issue.

It is respectfully submitted that the Trial Court corrected its error properly and without harm or prejudice to the petitioner.

VI.

THE PETITIONER FAILED TO PROVE THAT A REFUSAL TO ENFORCE THE ALLEGED CONTRACT WOULD WORK A FRAUD UPON HIM, AND THAT THE SERVICES RENDERED WERE NOT COMPENSABLE IN A SUIT AT LAW AND SO WAS NOT ENTITLED TO RELIEF.

The petitioner argues that the Circuit Court of Appeals, when it dismissed the bill of the petitioner, acted contrary to the rule of this Court and of the sixth and tenth Circuit Courts of Appeals. Petitioner argues that there had been a change of position in eight years of continuous performance to the satisfaction of the promisor, with benefits to her from the services rendered by the petitioner.

Some review of the facts in the statement is again necessary. Neely had been through bankruptcy three times before he met Mrs. Calef. At the very time he met her, he was engaged in selling second hand furs, that, according to his own witnesses were not very attractive. According to the Special Master, he took up his residence with Mrs. Calef and paid his share of the expenses in the house. He assumed control of her affairs, borrowed $17,000.00 from her; took into his possession all of her securities. If he acted as financial advisor, there was no service that he rendered that was not compensable in a suit on quantum meruit. From the evidence he was an adventurer. He did not change his status in any way, except to improve it. There was no harmful change in his position. He suffered and gave up nothing. There is no proof of any services rendered by the petitioner which were not recoverable in a suit at law.

In *Cooper* v. *Colson*, 66 N. J. Eq. 328, 58 Atl. 337, the Court of Errors and Appeals said:

> "In every case, in order to take the case out of the statute on the ground of part performance, irrespec-

tive of other questions, two things are requisite. The terms of the contract must be established by the proofs to be clear, definite and unequivocal, and the acts relied on as part performance must be exclusively referable to the contract. * * * But the mere proof of the performance of services is not sufficient. Such services may be adequately compensated for by a recovery of damages. Such services, thus performed, are of no greater efficacy to take the case out of the statute than would be a payment in whole or in part of the consideration money agreed to be paid upon a parol contract to convey land for cash.

"It must appear, to constitute ground for a decree for the specific performance of an oral agreement to convey land, founded upon alleged services, that the services were in some respects of an exceptional character and that it is obvious that the parties not only did not intend that they should be measured by ordinary pecuniary standards, but that they were of such a peculiar character that it is impossible to estimate their value by any such standard."

Applying these rules, any services which Neely is alleged to have performed, could be adequately compensated by a action at law for damages. There is no proof of any change of position on his part. He surrendered nothing. The course of his life was not changed except so far as his retention of the $40,000.00 has apparently enabled him to lead a life of ease and travel since Mrs. Calef's death.

In Boulanger v. Churchill, 86 N. J. Eq. 96, 100, 97 Atl. 947, Vice Chancellor Lewis said:

"Payment, however, is not an act which demands the specific performance of an oral contract.

"Payment in services will not, as a general rule, take the contract out of the statute any more than payment in money; but some services cannot be measured by their money value, and were not intended to

be so measured. Services of affection rendered by a child to its parent, rendered as consideration for an oral promise, cannot be compensated by money damages.

"I find, however, that the case under consideration cannot be covered by this doctrine of part performance so as to take it out of the statute, and I think the complainant's remedy is on the quantum meruit. Cooper v. Colson, et al., 66 N. J. Eq. 328.

"A decree dismissing the bill is accordingly advised."

In Cochrane v. McEntee, 51 Atl. 279, 280 (not officially reported), Vice Chancellor Emery says:

"* * * The consideration on the part of the plaintiff, according to her own account, was simply the advance of money, and it is familiar law that the mere payment of money on one side as part of the consideration is not such a part performance of a parol contract to convey lands as will entitle a court of equity to decree specific performance. Pom. Spec. Perf. Cont., Secs. 102, 103; Campbell v. Campbell, 11 N. J. Eq. 268, 270. And the case does not come within the principle of Kastell v. Hillman, 53 N. J. Eq. 49, 30 Atl. 535, and other cases cited, where specific performance has been enforced of contracts to devise or convey lands made in consideration of services or other acts or benefits rendered directly to the promisor, and which could not be measured by a pecuniary standard. Pom. Eq. Jur., Sec. 114. Even taking the complainant's own statement as sufficient proof of the circumstances of the original receipt of the money by the father, it seems to me clear that she has no right, by reason of the advances, to the conveyance of any interest in the lands, or to have the debt, or any portion of it, charged on the land. The defendant, denying the agreement

> alleged by complainant, claims to have established that the father, subsequent to these alleged advances by complainant, assisted her and supported her, with her family during her husband's absence, to an extent sufficient to pay any obligation for money borrowed by him. But, without disposing of this issue, and taking the complainant's case on this part as presented by her own evidence, I reach the conclusion that on the claim to be a creditor of her father she has shown no case for relief in this court in reference to the lands in question."

Under the established rule in the jurisdiction of New Jersey, Neely's right to specific performance or relief in the nature of specific performance depended upon proof that he had performed a type and character of services which could not be compensated in an action at law. He admittedly made no improvements to the real estate of another. He admittedly not only received back all monies which he advanced but was found indebted to the decedent in the sum of $41,000.00. He retained half of the profits of the stock speculations in which he used Mrs. Calef's funds. There was no change in his status.

In *Johnson* v. *Wehrle*, 9 N. J. Misc. 939, 949, 156 Atl. 229, Vice-Chancellor Backes, in dismissing such a bill said:

> "It is felt that this hard-working worn-out old woman found surcease, comfort and contentment in the home of her sister, where she was willing to be of service in the expectation of being rewarded by her rich sister, who, mayhap, held out the prospect. At all events, she did not step out of her ordinary vocation and if her work there was more arduous than in her other jobs, it is estimable by a jury. She will be left to her remedy at law. The case is ruled by Cooper v. Colson, 66 N. J. Eq. 328. The bills will be dismissed."

With some qualifications, the quotation of Vice Chancellor Backes may be applied to the petitioner. Of course, the petitioner was neither a hard working nor worn out old man. He did find surcease, comfort and contentment in the home of the decedent. He saw to it that he was amply paid for any service which he could ever claim to have rendered. He entered the home a bankrupt. He left the death bed of the decedent with $50,000.00 in cash. There is not an intimation in all the testimony that Neely's circumstances or status or position was changed or that he surrendered any personal benefit in his association with Mrs. Calef.

In *Danenhauer* v. *Danenhauer,* 105 N. J. Eq. 449, 451, 148 A. 390, Vice-Chancellor Ingersoll with approval quotes from a long line of cases and says:

> "The remedy is afforded upon the ground that it will work a fraud upon him who, induced by the agreement, had in good faith so performed it as to irretrievably change the situation of the parties to his disadvantage, to permit the other party to refuse fulfillment upon his part."

In *Lings* v. *Urquhart,* 106 N. J. Eq. 506, 508, 151 A. 391, Vice-Chancellor Lewis likewise said:

> "* * * And rightly so, for to hold otherwise would be to enable the party to such agreement, declining to perform on his part, to successfully perpetrate a fraud upon him, who, relying upon and induced by said agreement, has in good faith so performed it as to have irretrievably changed his position to his disadvantge."

The foregoing cases contain a multitude of decisions from the jurisdiction of New Jersey. This change of status mentioned in these cases is one prerequisite to

the right to relief. A careful examination and a review of the entire record compels the conclusion that Neely in no wise altered or changed his status. He surrendered or gave up nothing. He obtained a home for himself. He enriched himself with at least $41,000.00 of funds belonging to the decedent. Contrary to the statement in petitioner's brief that there had been a change of position, Neely had benefited and improved his position at the expense of decedent.

In line with the foregoing decisions and with the very decisions mentioned in the brief of the petitioner, the judgment rendered is proper. A careful reading of the opinion of the Circuit Court of Appeals reveals no passage or statement wherein its decision is predicated upon this ground that there was no change of position. Petitioner apparently claims that the Circuit Court of Appeals erred in failing to enforce the contract in the belief that the evidence brought the case within such rule. Petitioner's argument fails because its recital of the facts is palpably controverted by the evidence. If the status of Neely was in any way changed through his association with Mrs. Calef, it was to his immense betterment and increase in personal wealth. If he rendered any services, those services were of such a character that if he had not been compensated in full, he could have recovered the value thereof in an action of law. His failure to sue at law is explained by his retention of the funds of the decedent to the amount found by the Special Master.

VII.

N AN ACTION TO PROVE A PAROL CONTRACT OF A DECEDENT, CLEAR AND CONVINCING PROOF OF ITS EXISTENCE AND PERFORMANCE IS REQUIRED.

The petitioner urges that the Circuit Court of Appeals rred in its decision because it required the establishment f a case by more than a fair preponderance of the evidence. What is meant by the statement of the petitioner that his error took place despite the District Court's ruling hat the petitioner had done so, is not apparent from a horough reading of the brief. In this argument, the petiioner is guilty of deliberate distortion of the record in is brief. Petitioner states that the District Court conluded that the petitioner had proven a prima facie case nd refers to R. 476. No such statement of the Trial Court ppears at the close of the motion to dismiss the complaint. The Court stated:

> "It may be that I will, upon the examination of some of the cases change my view but at the moment, I am of the opinion that the motion should be denied and that is my order; that, of course, reserves to you the right to renew the motion at any time" (R. 476).

In connection therewith, the petitioner further asserts hat the respondents conceded that the petitioner was enitled to a decree that the contract was established and ites as authority the record from pages 1583 to 1585. Respondents' counsel stated at Record, page 1585: "There are several reasons why this contract, if it was found to exist, could not be enforced". This discussion took place, it will be noted, at the argument on the requested findings. The charges made that the Circuit Court imposed an extraordinary and additional burden of proof are refuted by

reference to the opinion of the Circuit Court. The Circuit Court stated:

> "Was the learned District Judge in error in holding that the appellant had not sustained the heavy burden placed upon him under circumstances such as those at bar of showing by clear and convincing proof the existence of the contract referred to and the appellant's performance thereunder?" (R. 1730).

No extraordinary burden was placed upon the petitioner by the Circuit Court. The rule applied by the Circuit Court has been laid down without variance in a long line of cases in the jurisdiction of New Jersey. Neely, the petitioner, according to the decision of the District Court Judge, was entitled to little credence. The evidence of his own witnesses including lawyers and friends indicated that there was no contract but merely appreciation on the part of Mrs. Calef.

Statements by Neely to a banker, to a man of all work and to a contractor that his association with Mrs. Calef was grounded upon his expectation that out of gratitude, she would bestow upon him something valuable. Neely, himself, throughout the trial was guilty of repeated contradictions. His own witnesses contradicted each other. Neely's own letters destroyed his story. This evidence was completely unsatisfactory and insufficient to furnish a basis for a decree which would establish a contract in his favor.

In the case of Burdick v. Grimshaw, 113 N. J. E. 591, Vice-Chancellor Lewis, after reviewing numerous authorities, said:

> "Sight, however, must not be lost of the fact that parol agreements of that character are not looked upon with favor by the courts. Vreeland v. Vreeland, 53 N. J. Eq. 387, 32 A. 3; Burrell v. Middletown, 72 N. J. Eq. 774, 65 A. 978, affirmed 73 N. J. Eq. 741,

70 A. 1100. Such is but the natural result of the fact that they are easily fabricated and most difficult to disprove, since they most usually are not brought into controversy until after the grim reaper has intervened and forever hushed the voice of the alleged promisor. Moreover, they afford unlimited opportunity, with but little danger of detection, to unscrupulous persons, intent upon the pillage and spoliation of decedent's estates, for the perpetration of fraud and the wrongful diversion of a decedent's property from those to whom it otherwise naturally would have passed. It is because of these facts that the courts have come to regard this class of oral agreements with grave suspicion, have subjected them to close scrutiny, and have allowed them to stand only when established by evidence that is clear, cogent, and convincing, leaving no doubt with respect to their actual making and existence."

Judge Biggs in the opinion of the Circuit Court of Appeals cited the opinion by the Court of Errors and Appeals of New Jersey in Cooper v. Colson, 66 N. J. E. 328, 333, in which Justice Fort said:

"Most scrupulous care should be exercised by the courts in this class of cases, and especially where one of the alleged contracting parties is dead. An allegation of an agreement to convey is easily made, and casual conversation or jocular remarks of intent to devise or convey at death can readily be turned into serious import * * * such power should be exercised upon the most clear proof * * * of the contract to devise * * *".

Further cases in the State of New Jersey to the same effect are:

Cooper v. Carlisle (Court of Errors and Appeals), 17 N. J. Eq. 525.
Vreeland v. Vreeland, 53 N. J. Eq. 387; 32 Atl. 3.
McTague v. Finnegan, 54 N. J. Eq. 454; 35 Atl. 542.
Cooper v. Colson (Court of Errors and Appeals), 66 N. J. Eq. 328; 58 Atl. 337.
Haberman v. Kaufer, 70 N. J. Eq. 381; 61 Atl. 976.
Laune v. Chandless, 99 N. J. Eq. 186; 131 Atl. 634.
Weyer v. Weyer, 106 N. J. Eq. 506; 151 Atl. 391; affirmed 109 N. J. Eq. 131; 156 Atl. 377.
Scott v. Beola, 111 N. J. Eq. 215; 161 Atl. 822.
Johnson v. Wehrle, 9 N. J. Misc. 939; 156 Atl. 229.
McNamara v. Bohn, 108 Atl. 764.

The very words "greater weight" and "preponderance of proof" indicate a heavy burden. When the Circuit Court of Appeals used heavy burden, it did so advisedly. The cases with uniformity declare that the quality of proof must be clear and convincing. This quality was particularly lacking in the instant case.

CONCLUSION.

The six specifications of errors have been discussed. It is respectfully submitted that in each specification urged by the petitioner, not only was there no error, but there was strict compliance with the existing decisions.

There are in addition to the reasons which have been discussed further full and sufficient reasons why the judgment of the Circuit Court of Appeals should not be disturbed. The Circuit Court of Appeals in its conclusions did not rest its judgment alone upon the reasons of which complaint is made by the petitioner. In the last paragraph of its opinion, the Circuit Court offers further grounds.

Because the petitioner had charged that Mrs. Calef had agreed to make him residuary legatee after certain un-

specified bequests, the Circuit Court held that "the terms of the alleged contract are not sufficiently specific to permit its enforcement" (R. 1733). This objection was extended to the prayer of the bill of complaint to impose a trust upon the entire estate.

The Circuit Court further found that the petitioner was entitled to no relief because he had failed to come into court with clean hands, "in the light of the record in the case at bar, we are convinced that the appellant does not come into court with clean hands."

Since the issues in the case at bar are peculiarly local and involve the state decisions which were applied; since no decisions hold that a contract is judicially admitted by an argument in a brief in a distinct and separate cause of action; since in accordance with the decisions of the Courts of New Jersey, the Circuit Court of Appeals properly held that the contract terms were not precisely established; since adequacy of consideration was not considered but the apparent and evident failure of the petitioner to perform the alleged contract was determined; since the Trial Court corrected an erroneous order, and this action was approved by the Circuit Court of Appeals; since the petitioner offered no proof that he had changed his position but by the evidence had benefited at the expense of the decedent and her estate; since the rules of the quality and quantum of proof, as defined by the decisions of the Courts of New Jersey, were applied; and since the Circuit Court of Appeals for additional reasons, of which no complaint is made by the petitioner, affirmed the judgment of the District Court, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

THEODORE D. PARSONS,
FRANK F. GROFF,
Counsel for Respondents.

APPENDIX.

EXCERPTS FROM THE OPINION OF VICE-ORDINARY MAJA LEON BERRY, OF THE NEW JERSEY PREROGATIVE COURT, RENDERED IN RE CALEF, 109 N. J. EQ. 181.

"* * * The decedent is described in the brief of the respondents as a 'proud and cultured woman, the widow of a railroad financier—alone in the world, surrounded only by her servants and visited infrequently by a few scattered friends.' This description is undoubtedly accurate. Her husband died about 1911, leaving her with a substantial competence, which, in 1919, due to unfortunate investments, had materially dwindled. It was at this time, when she was about seventy years of age, that she met the petitioner, who was ten years her junior, and who describes himself as a 'lecturer, coal broker, trader in stocks and bonds, also promoter of some promising enterprises and patents.' He posed as an expert in financial matters, and previous to his meeting with the decedent, had apparently had a checkered career. He claims to have been a man of substance at this time, but this is open to question, and he had, a short time previous, gone through bankruptcy, but had, to some extent, rehabilitated himself financially. For the ensuing ten years and up until the date of Mrs. Calef's death, he occupied a position of trust and confidence toward her, and was, in his own words, 'the confidential friend and adviser in financial matters,' and had 'full power of attorney against the funds and checking account of Mrs. Calef.' He also had access to her safe deposit box at the Guaranty Trust Company of New York, and, with her, claims to have operated in a joint stock account on the New York Stock Exchange. He operated in his own name but used the funds of both in his trading and there was

nothing in writing to show that Mrs. Calef had any interest in any funds or securities under his control. He had evidently met with some success in conserving Mrs. Calef's assets and increasing her income, but to what extent is not definitely shown. The major portion of the estate of which she died seized she inherited from her brother, who died in 1928. During the entire period of the proponent's acquaintance with the decedent they were closely associated, Mr. Neely residing at decedent's home at Sea Bright every summer, and, at other times, traveling around the country with her or residing at the same hotel, or at a nearby hotel, in New York city, and during this whole period he assumed entire charge of Mrs. Calef's business affairs.

The evidence indicates that Mrs. Calef was mentally capable of transacting business and continued so up until a short time before her death, but that she trusted the proponent implicitly with her affairs. The will was drafted by the proponent's lawyer, to whom he had introduced her a short time before, in the lawyer's office, and in the presence of both proponent and decedent, and was executed by the decedent in proponent's presence.

* * * * * *

That Mrs. Calef did contemplate some change in the disposition of her property after the death of her brother in 1928 is plain and is admitted by the proponent. In the fall of 1928, at her request, Neely had reconveyed the Sea Bright property to her because, as he says, there was no occasion for him to retain the title any longer as his money advances to her had then been repaid, and she desired it because she thought it would look better to have title in her name. Neely's testimony, considered in connection with his affidavit filed in support of the petition for probate, is so inconsistent, shifting and evasive that I regard

it as almost totally unreliable. It is in some particulars in direct conflict with that of witnesses whose truthfullness and disinterestedness cannot be questioned. It is particularly in conflict with the testimony of Judge Truax and Mr. Reussille, two reputable members of the bar of this state, and totally disinterested. His testimony is also in direct conflict with that of Mrs. Reed, of Mrs. Bouse, and, on one point at least, with that of his own witness, Mrs. Clark. He testified that Mrs. Clark introduced Mrs. Calef to Mr. Hume, but this is flatly denied by Mrs. Clark and I think other circumstances indicate clearly that the introduction was by Neely himself. He has testified at least two ways on almost every vital point in the case. He has testified that he kept the will in his traveling bag continuously, and that he did not; in his affidavit filed with the petition for probate he said that after receiving the will he took it to his apartment in New York and filed it away with certain other legal papers; in his answer to cross-interrogatory forty-six he admits that he has no apartment in New York at that time, and then states that he was not sure whether he had such an apartment or not; and, finally, that he was living at Mrs. Calef's home in Sea Bright, to which he returned on the afternoon of the day on which the will was made; that he immediately put the will in a safe deposit box in a bank, and that he did not do so. He named at least six or seven banks and as many hotels where he either had or might have had safe deposit boxes and in which he might at times have kept the will. But I think it extremely doubtful if he has any reliable knowledge as to where the will was at any particular time. His invariable answer was that it might have been in such and such a place. But it cannot be denied that he never actually saw the will itself after 1922 when he had it in Mr. Avery's office. He also stated that Mrs. Calef knew that the will was in

the traveling bag, and that she did not; that he saw the will frequently between the date of its execution and 1929, and that he did not; that he discussed the will with Mrs. Calef between those dates and that he did not. If he ever had it in his possession after 1922, which I very much doubt, it is singular that he cannot definitely name any repository of it during the ensuing seven years, except the now famous traveling bag in which he claims to have kept his own and many of Mrs. Calef's private and valuable papers. Sane persons, and especially astute business men of the type which Neely professes to be, do not usually carry their wills, or the wills of others in which they have a substantial interest, around the country in their pockets or in their traveling bags, particularly where they are maintaining so many safe deposit boxes in responsible financial institutions, as he alleges he did. The usual repository for such valuable papers is a bank, and it is reasonable to assume that a woman of Mrs. Calef's reputed mental caliber would do with her will what any other reasonable prudent woman would do, i. e., place it in her safe deposit box at the Guaranty Trust Company, where, indeed, Neely looked for it after her death. Justifiable inferences to the effect that the will had, to the proponent's knowledge, disappeared and was destroyed long before Mrs. Calef's death, arise from Mr. Neely's frantic efforts to procure the execution of a new will by Mrs. Calef during the period immediately preceding her demise. Fuller made three trips to Mrs. Calef's home for this purpose. On the first trip he was unable to see Mrs. Calef because of her physical condition resulting from an automobile accident; on the second trip, in October, he says he consulted with her about the drafting of a 'codicil'; and on the third trip he arrived too late, as death had intervened. In the summer of 1929 preceding Mrs. Calef's death, Neely endeavored to have

Hume come to Sea Bright for the purpose, as he expressed it, of 'drafting a codicil' to the old will. The effect of this testimony about 'codicils' obviously intended to show the continued existence of the will drawn by Hume, is, to say the least, greatly weakened by the testimony as to the events now to be recited. The day before Mrs. Calef died Judge Truax was hurriedly called by telephone. He prepared at Neely's request, a draft of a will which was proposed she should execute, making Neely her sole beneficiary. Because of Mrs. Calef's condition, Judge Truax very properly would not permit any attempted execution and left the house. He was called back later on the same day, but found Mrs. Calef in a comatose condition and again left without any attempt to have her execute the will. Notwithstanding this situation, Neely and Miss Fahrner, the seamstress, asked the nurse, Mrs. Bouse, to place the pen in Mrs. Calef's hand and guide her hand in the making of a signature. This, of course, is denied, but I accept the testimony of Mrs. Bouse, who has no interest whatever in the matter and no incentive to falsify. On the morning of the day on which Mrs. Calef died, Neely hurriedly called another lawyer, Mr. Reussille, of Red Bank, to prepare a will for Mrs. Calef; but before Mr. Reussille had ever seen the decedent, and while he and Neely were in conversation, the nurse announced Mrs. Calef's death. The testimony concerning what happened upon the visits of Judge Truax and Mr. Reussille is interesting and enlightening. From the condition of the house it was quite evident to Judge Truax that a search for some missing document had been made before his arrival. He says that on his first visit Neely told him that a New York lawyer had drawn a will for Mrs. Calef to sign and also one for Neely to sign, and that Neely then looked through a satchel while he was there and found two drafts of wills, 'one was

for him to sign—I don't know about the other.' Nothing was said about a previously executed will of Mrs. Calef's which had been lost. 'He said he couldn't find a will that was drawn by this attorney in New York.' 'He said it was a will drawn for her to sign.' Judge Truax was again there later that day, about five-thirty in the afternoon, and remained until seven. This was on Sunday, the day before Mrs. Calef died. Late that afternoon Neely telegraphed Fuller: 'Will you not come by train to Sea Bright. Extremely urgent.' Fuller left his home in New York State by automobile about eight P. M. and drove to Sea Bright, a distance of over four hundred miles, arriving there the next day after Mrs. Calef's death. He found Hume already there, but he, too, had arrived too late. Mr. Reussille was called to the Calef home by Neely that morning 'on a matter of life and death.' On his arrival, Neely told him that he had been searching Mrs. Calef's effects for a will but had been unable to find one. It was not indicated to Mr. Reussille whether the search was for an executed will or a draft of a will to be executed.

It will be recalled that during the summer Neely had some communication with Hume and Fuller about drafting a codicil to Mrs. Calef's will. Was it a codicil? And if we turn to Fuller's testimony we find that he actually did draw a new will for Neely immediately after his October visit and sent it, with a copy, to him by mail on November 2d. He says that on October 27th, 1929, he discussed the proposed codicil to her will with Mrs. Calef. Was it a codicil? He says its preparation was deferred. But, was it? When Judge Truax arrived at the Calef home Neely had been searching for wills which had been prepared by a New York lawyer, but had not been executed. He had found one, his own, but not the other which was to have been executed by Mrs. Calef. Had Fuller made a mistake

and prepared a draft of a new will for Mrs. Calef, and sent it to Neely with a draft of his, Neely's proposed new will on November 2d, and forgotten about it? Evidently somebody had prepared such a draft for Mrs. Calef and Neely in his extremity could not find it. Had he found it he need not have called Judge Truax, or Fuller, or Hume, or Reussille; he would have needed no other draft for Mrs. Calef to execute. The one he was looking for, had he found it, might have been executed by her while she was yet 'mentally alert,' these four lawyers would have been saved the inconvenience of their hurried trips to the Calef home, and this controversy would never have come before the court. And this leads to the question: Had not both Mrs. Calef's and Mr. Neely's wills, which Avery saw in 1922, been long since destroyed? And is not that the explanation of all this talk about new wills and codicils after the death of Mrs. Calef's brother? If this will, copy of which is now offered for probate, had not, to Neely's knowledge, been destroyed, why all these frantic efforts to have a new will executed. As early as the first part of October, Neely had requested Mrs. Reed, the wife of Mrs. Calef's physician, to use her influence with Mrs. Calef to induce her to make a will in Neely's favor, and to ask Dr. Reed to use his influence also. It was to deny this testimony on the part of Mrs. Reed that Neely was called before the court in rebuttal and asked the one question on direct examination. Mrs. Reed is a lady of culture and refinement, a disinterested witness, with no incentive to falsify, and I believe she testified truthfully. Of one thing we may be sure; the will was not in existence at Mrs. Calef's death. If it had been in Neely's custody, as he said, he would have found it on November 24th, the day before Mrs. Calef died. But let us assume, for the moment, that the will was in Neely's custody, as he says it was. The bag in which he claims it was kept

was in his room, unlocked, and, without a doubt, easily accessible to Mrs. Calef. In fact, he admits that anyone who wanted to do so could have opened the bag and taken from it the will or any other papers that he had therein, at any time during the summer periods when he had the bag at the Sea Bright house. As against this possibility what is there to show that she did not do so? But Neely says that the bag was on top of the wardrobe and that Mrs. Calef could not get it without getting up on a chair or stepladder, a perilous feat for such an aged lady. But Mrs. Megill, the servant, says the bag was on the floor of the closet and she had to move it in cleaning the room. Why should she lie about it?

There are compelling reasons here for not giving the word of Neely an absolute right of way. All of his testimony respecting custody of the will and access or opportunity to repossess by Mrs. Calef, and, in fact, almost his entire testimony, is such as could be denied by no one except Mrs. Calef. And her voice is silenced by death. Neely has undoubtedly testified falsely in some particulars. 'Falsus in uno, falsus in omnibus.' And while I need not, of course, discard all his testimony, I have no hesitancy in saying that I place very little reliance upon it.

* * * * * *

Nor is Fuller's testimony to be accepted at its face value any more than is that of Neely. Fuller is entirely too much interested in this controversy to be an impartial witness. He has, if anything, taken a more lively interest in the affair than Neely himself; at least so far as could be observed by the court. I do not recall that he missed any sessions of the court when any testimony was taken. He attended before the commissioner as counsel for Neely at the time of Neely's deposition in Albion, New York, and later when it was

found that these depositions were defective, he went to the commissioner's office with Neely, and, without any notice to opposing counsel, with the commissioner, attempted to revamp these depositions, but due to their admitted defects, they were excluded from the record. He was present at the taking of Neely's deposition in Miami, Florida, which covered a period of over a week, and attended every session before the master, acting as counsel for the proponent. Although not recorded as such by the master, it so appears from opposing counsel's statement on the record which was not denied by either Neely or Fuller. He has been a bosom friend of the proponent for many years, visiting him from time to time at Mrs. Calef's home in Sea Bright, and in the fall of 1929, with an alacrity worthy of a younger man, responded to Neely's urgent calls, as already related.

* * * * * *

Clearly, the proponent's case must stand or fall by his own testimony, and that of his two New York lawyers, Hume and Fuller, who are his main supports. Without their testimony respecting delivery and custody of the will, the whole case would fall. They are all biased and interested witnesses. Neely is the chief beneficiary of the will. Hume and Fuller are the guiding hands in this controversy. Both have acted in the dual capacity of witness and counsel, and they were over-zealous. In the last analysis, as already indicated, Hume's testimony is not important, and it might be given full credence, and yet, proponent's case must fail because of the unreliability of his testimony and that of Fuller. Both are in the discard."

OPINION OF UNITED STATES DISTRICT COURT JUDGE FAKE.

(Filed January 17, 1939.)

The plaintiff herein seeks specific performance of an alleged oral agreement made by Eliza A. S. Calef with him on or about September 10, 1921, whereby she agreed, among other things, to "execute and leave on her death, her last will and testament, wherein she would provide that plaintiff should be her residuary legatee and devisee", and also to make plaintiff the executor of said will.

The said Eliza Calef departed this life on November 25, 1929 intestate. Thereafter, proceedings were brought in the Prerogative Court of New Jersey to probate a carbon copy of a will alleged to be the last will of Eliza A. S. Calef. This resulted in a denial of probate by the state court and a final holding that the original will had been destroyed *animo revocandi.* In dealing with the subject matter involved in that proceeding, the learned Vice-Ordinary filed an exhaustive opinion, in the course of which he said, as bearing upon the credibility of plaintiff: "There are compelling reasons here for not giving the word of Neely an absolute right of way. All of his testimony respecting custody of the will and access or opportunity to repossess by Mrs. Calef, and, in fact, almost his entire testimony, is such as could be denied by no one except Mrs. Calef. And her voice is silenced by death. Neely has undoubtedly testified falsely in some particulars. *'Falsus in uno, falsus in omnibus.'* And while I need not, of course, discard all his testimony, I have no hesitancy in saying that I place very little reliance upon it." *In re* Calef's Will, 109 N. J. Eq. 181; 156 Atlantic 475.

So likewise here, the testimony of Neely, his attitude on the witness stand and his general demeanor before the Court has led me to accept his testimony on material matters, only when corroborating circumstances have been found to support his position.

At the time of their first meeting, Mrs. Calef and Mr. Neely were well along in years, she a widow, and he a widower. This acquaintance ripened into a strong platonic friendship. Both were without family encumbrances and undoubtedly found comfort in each other's society. They resided at times under the same roof at her shore home known as "Bagdad", and at divers hotels and other places always occupying different bedrooms. That he desired to and did assist her in her tangled business affairs during the years of their companionship, there can be no doubt, and that she was grateful to him and appreciative of such services at times there also can be no doubt. But the evidence before me is not strong enough to permit the conclusion that she made an agreement with him as hereinbefore outlined or if any such agreement was made that he performed the same on his part.

The consideration for the alleged agreement to leave a will as aforesaid was an undertaking and promise on the part of Neely to render services to Mrs. Calef in her business affairs during her lifetime, and also for past services of a like nature theretofore rendered by him. There is nothing definite as to what those services were to consist of other than that he was to invest such funds as she had and account to her for the same when requested, and clear up a bad situation in her affairs which unwise investments had theretofore occasioned. How he handled her accounts in this connection therefore became a matter of prime importance in this case, since it would be encumbent upon him to be in a position at any time during the life of Mrs. Calef, to render her on account of his dealings with her funds. Unless Neely could so account, specific performance cannot be decreed, since he comes into equity with unclean hands. Moreover, his right to relief here must be based upon his performance as a condition precedent.

It became apparent at the trial that a detailed accounting by Neely would be a controlling factor in the case, and an order of reference was therefore made to a Master. The

Master has made and filed his report, and after considering the objections thereto, I am of the opinion that the same should be confirmed in all things. It discloses that Neely was charged with $42,541.82 and could be discharged for $1,354.38 only, leaving him unable to account for the sum of $41,187.44.

It therefore appears that even if Mrs. Calef did enter into an agreement as alleged with Neely, he has not performed the terms and conditions thereof with which he was burdened.

A decree will be entered for the defendants in conformity herewith.

EXCERPTS FROM REPORT OF SPECIAL MASTER APPOINTED BY DISTRICT COURT JUDGE FAKE.

"1. That from about September, 1921, to the time of her death on November 25th, 1929, Mr. Neely had power of attorney to act for Mrs. Calef and was entrusted by her with control over and management of her property and financial affairs (p. 140, 141, 226, 226, 443, 545).

"2. That, notwithstanding any intent Mrs. Calef ever may have had in respect to testamentary disposition of her property, her intent and understanding during said period was that Mr. Neely, as her trusted agent, was managing her property and financial affairs for her, as her separate estate, and that, aside from their joint stockmarket speculations, she was in no sense going along in joint account with him.

"3. That Mrs. Calef was meticulous in keeping account of her separate property, credits and liabilities, and particularly in respect to adjustment of charges

against and credits due to Mr. Neely insofar as she had knowledge of the facts (pp. 471-472; Ex. P-64; pp. 241-247; &c).

"4. That the existence of the mutual wills, by which the survivor would take all, made it seem to Mr. Neely that it would ultimately prove to be immaterial whether he treated Mrs. Calef's property as being hers or as being his.

"5. That Mr. Neely did treat and deal with the property and money of Mrs. Calef **as if** he and she were going along in joint account, upon the belief or assumption that whatever she died possessed or seized of (except a few legacies) would come to him by her will.

"6. That Mr. Neely relied upon the existence of Mrs. Calef's said will in his favor, and expected never to be called upon to account for his dealings with and management of her property and financial affairs.

"7. That in all his said stock market transactions involved in said brokers' accounts (excepting the Fahnestock account and the Clark, Childs & Co. account to which it was transferred in the name of 'F. T. Neely, No. 2', both of which were the sole property of Mrs. Calef), Mr. Neely was 'going along in joint account' with Mrs. Calef **whose money and securities were used,** with some contributions by Mr. Neely, to finance and margin said accounts" (R. 1122-3).

* * * * * *

"Mr. Neely charges himself only with those items which defendants' accountants had discovered and charged him with before the order of reference was made. He makes no attempt to show **all** moneys and

securities of Mrs. Calef which came into his hands or under his control (p. 92). He attempts merely to establish credits sufficient to off-set the aforesaid few items of charges. He says (p. 311): 'It is admitted that the moneys came to me. * * * We are trying to prove that moneys were returned.' He renders no complete account of their stock market ventures (p. 370).

"He claims that the records which would exonerate him have been lost; that Mrs. Calef's records, together with many of his own, were in a trunk at Bagdad which was sold at auction after the effects of Mrs. Calef's estate had been taken charge of by the administrator **pendente lite;** that a certain bag that was marked in evidence in the will case contained papers and records that would be helpful on this reference; that the contents of the bag were turned over to his attorneys (and apparently 'lost', for they were not produced before me); and that he has produced everything he has in writing relative to his dealings with Mrs. Calef's property and financial matters.

"It is clear that since Mrs. Calef's death numerous attorneys have represented and been associated with Mr. Neely in this present suit and in the will case, and that there have been a great many relevant records, memoranda account books, cancelled checks, &c., in the possession of Mr. Neely and his attorneys which have not been produced before me. From the evidence it is impossible to determine who is responsible for the disappearance of them, if they have disappeared. The fact, however, is that the few original papers, checks and records produced are entirely such as Mr. Neely conceives are helpful to him. Furthermore, as the hearings progressed, he was able to find somewhere and produce before me (in at least two instances) additional papers bearing upon questions that had arisen in the course of the examination, even though all exist-

ing records were supposed to have been turned over to his accountant before the examination of witnesses was begun.

"I doubt that plaintiff has produced all available, material records or that he has made as full and complete an account and disclosure as is now possible, but the record does not enable me to find as a fact that he has not done so" (R. 1124-6).

* * * * * *

"I accordingly state the account as follows in respect to such charge as have been proved against him, to wit:

Charges

Total charges as hereinabove set forth	$42,541.82

Discharges

Item A—Mr. Neely's checks to Mrs. Calef's order as above set forth	$ 1,000.00
Item B—Mr. Neely's checks for Mrs. Calef's account	354.38
Items C, D, E, F, G and H disallowed *in toto* as aforesaid	00000000
Total charges	$42,541.82
Total discharges	1,354.38
Excess of charges over discharges	$41,187.44

Respectfully submitted,

CHESTER W. FAIRLIE,
Master" (R. 1137).

OPINION OF CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939.

[fol. 1735] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1939

No. 7282

Frank Tennyson Neely, Plaintiff-Appellant,

v.

Merchants Trust Company of Red Bank, New Jersey, as Administrator of the Estate of Eliza A. S. Calef, Deceased, and Frederick H. Tarr, as Ancillary Administrator in the State of Massachusetts of the estate of Eliza A. S. Calef, Deceased, and Mary L. Hodgkins, Harriet G. Stacy, James D. Stacy, Fannie K. Stacy, Mary S. Stacy, Anna S. Lufkin, Gilbert C. McCormick, Harry McCormick, Lola Robinson, Hettie M. Morse, Jennie M. Sayward, Clifford E. Stacy, Fred C. Stacy, Everett Stacy, William A. Hamilton, Doris Alvord, Albert J. McCormick, Defendants-Appellees

Appeal from the District Court of the United States for the District of New Jersey

Opinion—Filed June 29, 1940

Before Biggs, Maris and Jones, Circuit Judges

Biggs, Circuit Judge:

The appellant, Frank Tennyson Neely, alleged in his bill of complaint and offered proof that he and Eliza A. S. [fol. 1736] Calef entered into an oral contract whereby in consideration of services and financial aid rendered and to be rendered by the appellant to her, she would make a last will and testament naming the appellant as her residuary legatee and devisee. Mrs. Calef died without leaving a will admissible to probate and the appellant now seeks specific

performance[1] of the alleged oral contract and also that a trust be impressed upon all of Mrs. Calef's property for his benefit. The appellees are the heirs at law of Mrs. Calef and her administrator and ancillary administrator. The District Court found, first, that the appellant failed to prove existence of the alleged contract, and, second, assuming the existence of a contract, the appellant had failed to carry out his obligations thereunder.

A brief recapitulation of the facts is necessary. Mrs. Calef died at her summer home, "Bagdad", in Seabright, New Jersey, when she was seventy-nine years of age. She left a substantial estate, the greater part of which she had inherited from her brother. At the time she met the appellant, the inheritance referred to had not come into her possession and she was in financial difficulties. She employed the appellant to help her conduct her affairs and to serve as her financial agent. Upon Mrs. Calef's death the appellant produced a copy of what he alleged to be her last will and testament and attempted to secure probate of it before the Prerogative Court of New Jersey. Probate was denied, the court pointing out that if a will is proved to have been within the testator's possession and upon death cannot be found, it will be presumed that it was destroyed by the testator with the intention of revoking it. The appellant claimed that though the will had been in his possession, he had lost it. The Prerogative Court did not credit this statement. In re Calef's Will, 109 N. J. Eq. 181, 156 A. 475, affirmed 111 N. J. Eq. 355, 162 A. 579, certiorari denied 288 [fol. 1737] U. S. 606. Following denial of certiorari, the suit at bar was commenced.

Was the learned District Judge in error in holding that the appellant had not sustained the heavy burden placed

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[1]We so refer to the relief sought by the appellant. Actually the relief sought by the appellant is not technical specific performance. It is rather relief in the nature of specific performance. See Page on Wills, 2nd Edition, 1926, Vol. 1, Section 107, p. 192.

upon him under circumstances such as those at bar of showing by clear and convincing proof the existence of the contract referred to and the appellant's performance thereunder? As was stated by the Court of Errors and Appeals by Justice Fort in Cooper v. Colson, 66 N. J. Eq. 328, 58 A. 337, "Most scrupulous care should be exercised by the courts in this class of cases, and especially where one of the alleged contracting parties is dead. An allegation of an agreement to convey is easily made, and casual conversation or jocular remarks of intent to devise or convey at death can readily be turned into serious import * * * such power should be exercised upon the most clear proof * * * of the contract to devise * * *". See also Lings v. Urquhart, 106 N. J. Eq. 506, 151 A. 391, affirmed 109 N. J. Eq. 131, 156 A. 377; Vreeland v. Vreeland, 53 N. J. Eq. 387, 32 A. 3. Applying the doctrines of the decided cases, we conclude as did the learned District Judge that the appellant failed to sustain that burden of proof necessary to prove the existence of the contract between himself and Mrs. Calef. We shall not dilate upon the proof offered by the respective parties. It is sufficient to state that the appellant's conduct at the time of Mrs. Calef's last illness was not that of an individual who deemed that his rights were protected under a valid and existing contract. While Mrs. Calef was upon her death bed, he endeavored to procure her to make a will in his favor, leaving her entire estate to him, and excluding from her bounty all other persons despite the fact that the paper which he offered for probate as Mrs. Calef's will before the Prerogative Court contained many specific bequests. There is evidence that despite Mrs. Calef's semi-conscious condition he tried to induce her trained nurse to guide the dying woman's hand to sign a will in his favor. Such evidence weighs heavily against the appellant.

[fol. 1738] Assuming, however, that there was a specific contract between the appellant and Mrs. Calef in the terms for which the appellant contends, none the less his performance under that contract was not such as would entitle him to relief. We reach the conclusion as did the court below

that such services as the appellant rendered for Mrs. Calef were rendered in reliance upon her generosity and certain present and definite benefits, and for this reason the appellant is within the rule enunciated by Vice Chancellor Ingersoll who made it clear in Danenhauer v. Danenhauer, 105 N. J. Eq. 449, 148 A. 390, quoting Chancellor McGill in Vreeland v. Vreeland, supra, that while equity would specifically enforce a parol agreement to make a will at the instance of a complainant who has completely performed it upon his part, such a remedy " '* * * is afforded upon the ground that it will work a fraud upon him who, induced by the agreement, has in good faith so performed it as to irretrievably change the situation of the parties to his disadvantage, to permit the other party to refuse fulfillment upon his part.' " It cannot be successfully contended that the appellant has met this test. Moreover the conduct of the appellant immediately preceding and following Mrs. Calef's death was in breach of the duties placed upon him by the alleged contract. During Mrs. Calef's last illness the appellant closed out brokerage accounts in the joint names of Mrs. Calef and himself and deposited at least $50,000 of the proceeds to his own personal account. Upon Mrs. Calef's death the appellant went to Cuba, arriving with $50,000 in cash, carried on his person in a money belt. He also had with him Mrs. Calef's jewelry. We entertain little doubt that the $50,000 referred to consisted largely of moneys belonging to Mrs. Calef's estate. Such conduct speaks for itself.

One point remains to be disposed of. The appellant contends that the contract between himself and Mrs. Calef was established as a matter of pleading in that the learned District Judge upon the appellant's motion struck out the fifth [fol. 1739] paragraph of the answer denying the fifth paragraph of the bill, which alleged the making of a contract between Mrs. Calef and the appellant with the terms and conditions contended for by the appellant. The appellant contends that because of this ruling by the trial court the existence of the contract was not in issue. The trial court did in fact grant the appellant's motion to strike out para-

graph 5 of the answer upon the ground that it was in violation of Equity Rule 24. This was clearly error because the affidavit of appellant's counsel upon which the order of the court was based contained nothing more than a restatement of appellees' counsel's brief in the Court of Errors and Appeals in the proceeding for the probate of Mrs. Calef's will, which recited testimony offered by the appellant in that proceeding. This point need not be dwelt upon further except to state that the learned trial judge corrected his error, as is amply demonstrated by colloquy between himself and counsel appearing in the record.[2] In effect the District Judge overruled his prior order and required the appellant to prove the contract. The effect of the affidavit was to permit the appellant to testify as to matters relevant to the contract allegedly occurring in the lifetime of Mrs. Calef. The appellant's mouth was closed in respect to these transactions because Mrs. Calef was dead. N. J. R. S. 2:97-2.

Other objections stand in the way of granting the appellant the relief sought by him. According to the very terms of the bill of complaint Mrs. Calef's obligation was to make the appellant residuary legatee and devisee only after she had provided for certain unspecified bequests to friends and servants. It follows that the terms of the alleged contract are not sufficiently specific to permit its enforcement. The same objection lies to the prayer of the bill of complaint to the effect that a trust be imposed upon the entire estate for the benefit of the appellant. In addition to all the foregoing it is axiomatic that he who seeks relief in a court of [fol. 1740] equity must come into court with clean hands. In the light of the record in the case at bar we are convinced that the appellant does not come into court with clean hands.

Accordingly the judgment of the court below is affirmed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

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[2]See pp. 1633-1683 of the record.

EXCERPTS FROM NEW JERSEY REVISED STATUTES.

2:97-2. Transactions With Lunatic or Decedent.

When one party to any civil action is a lunatic suing or defending by guardian or when one party sues or is sued in a representative capacity, no other party thereto may testify as to any transaction with or statement by the lunatic while of sound mind or with or by the decedent, unless:

a. The guardian of the lunatic or the representative of the decedent offers himself as a witness on his own behalf, and testifies to any transaction with or statement by his testator, intestate or ward, in which event the other party may be a witness on his own behalf as to all transactions with or statements by the lunatic while of sound mind or by the decedent, which are pertinent to the issue; or

b. The action is founded upon any allegation of fraud, breach of trust, willful default or undue influence, in which cases the defendant may be sworn and examined as a witness on his own behalf as to transactions with or statements by the lunatic or decedent.

Where a guardian or representative is a national bank, bank, trust company or other corporation, testimony of an officer or employee thereof shall be deemed testimony of the guardian or representative within the meaning of this section.